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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHNSON & HIGGINS,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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92 pp

QUESTIONS PRESENTED

The Age Discrimination in Employment Act ("ADEA") prohibits arbitrary age discrimination against "employees." The court of appeals held that the members of Petitioner's Board of Directors — who owned and managed the firm — were "employees" as a matter of law and thus that a policy adopted by the Directors and applicable only to them requiring retirement by age 62 was subject to the ADEA. The panel further held that the Directors' retirement policy was not within the scope of the ADEA's provision exempting actions based on "reasonable factors other than age" from the prohibition against employment action taken "because of age." The panel so held despite accepting that the retirement policy was not intended to discriminate invidiously on the basis of age, but rather was adopted in an effort to achieve orderly succession among Directors and to rationalize their post-retirement income.

The questions presented are:

1. Whether individuals who collectively own and manage a closely held corporation are nevertheless "employees" as a matter of law under the ADEA if they (1) perform traditional employee duties, (2) are not regularly employed by another entity and (3) "report" to someone higher in a hierarchy.

2. Whether a retirement policy that is expressed in terms of age cannot, as a matter of law, be "based on reasonable factors other than age."

PARTIES INVOLVED

At the time of the decision below, Petitioner Johnson & Higgins was a privately held corporation engaged in the insurance brokerage and employee-benefits consulting business. In March 1997, the stock of J&H was purchased by Marsh & McLennan Companies, Inc., and J&H is now a wholly-owned subsidiary of that company. J&H's only nonwholly-owned domestic subsidiary is Johnson & Higgins/Kirke-Van Orsdel, Inc. (*See* Court Rule 29.) Respondent Equal Employment Opportunity Commission is an agency of the United States Government.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES INVOLVED iii

TABLE OF AUTHORITIES vii

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

A. Statement of Facts 5

1. The Directors of Johnson & Higgins 5
2. Director Compensation and Stock Holdings 6
3. The Directors' Retirement Policy 8

B. The Proceedings Below 11

1. The District Court's Opinion 11
2. The Court of Appeals' Opinions 13
   a. The Majority Opinion 13
   b. The Dissenting Opinion 14

REASONS FOR GRANTING THE WRIT 16

I. The J&H Directors Were Not Employees for Purposes of the ADEA 17

A. The Panel's Decision Is Contrary to This Court's Decisions Construing the Term "Employee" in Federal Legislation 17

B. The Decision Below Conflicts with the Decisions of Three Other Courts of Appeals 20

II. The Directors' Retirement Policy Did Not Violate the ADEA Because It Was Based on Reasonable Factors Other Than Age 23

CONCLUSION 29

APPENDIX

A. Opinion of the Court of Appeals for the Second Circuit Affirming the District Court's Grant of Summary Judgment 1a

B. Order of the Court of Appeals Denying Petition for Rehearing 35a

C. Opinion of the United States District Court for the Southern District of New York Granting Summary Judgment 36a

D. Order of the District Court Enjoining Continued Operation of the Directors' Retirement Policy 51a

TABLE OF AUTHORITIES

Cases: **Page**

Bennett v. Spear, ___ U.S. ___, 117 S. Ct. 1154 (1997) 26

City of Los Angeles, Dep't of Water & Power v. *Manhart*, 435 U.S. 702 (1970) 27, 28

Devine v. *Stone, Leyton & Gershman*, 100 F.3d 78 (8th Cir. 1996), *petition for cert. filed*, No. 96-1423 (March 7, 1997) 21

EEOC v. *Dowd & Dowd*, 736 F.2d 1177 (7th Cir. 1984) 20, 21

Fountain v. *Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991) 21

Goldberg v. *Whitaker House Cooperative*, 366 U.S. 28 (1961) 17

Hazen Paper Co. v. *Biggins* 507 U.S. 604 (1993) 28

Hishon v. *King & Spalding*, 467 U.S. 69 (1984) 18

Hyland v. *New Haven Radiology Associates*,
794 F.2d 793 (2d Cir. 1986) 12, 18

McKennon v. *Nashville Banner Pub. Co.*,
513 U.S. 352, 115 S. Ct. 879 (1995) 18

Nationwide Mutual Ins. Co. v. *Darden*,
503 U.S. 318 (1992) 17, 18

Simpson v. *Ernst & Young*,
100 F.3d 436 (6th Cir. 1996),
petition for cert. filed, No. 96-1533
(April 1, 1997) 19

Statutes:

26 U.S.C. § 401(a)(C)(i) 10

28 U.S.C. § 1254(1) 2

29 U.S.C. § 621, et. seq. 17, 18, 23

42 U.S.C. §§ 2000e(b), (f) 18

Pub. L. No. 88-352 (1964) 24

Legislative Materials:

EEOC, Legislative History of the Age
Discrimination in Employment Act (1981) 24, 25

Administrative Rules and Decisions:

29 C.F.R. §1625.7 . . . . . 13, 27

29 C.F.R. § 860.103 . . . . . 26, 27

EEOC Decision No. 85-4, Emp. Prac. Guide (CCH) ¶ 6846, at 7040 (March 18, 1985) 18

Other:

Susan P. Hamill, *The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question*, 95 Mich. L. Rev. 393 (1996) 23

Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 Bus. Law. 1 (1995) 22

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, which affirmed the decision of the United States District Court for the Southern District of New York granting summary judgment against J&H and enjoining continued operation of its retirement plan for Directors.

Review by this Court is warranted because the court of appeals' decision is contrary to decisions of this Court, is in conflict with decisions from other circuits, and involves important questions of law of widespread applicability.

OPINIONS AND ORDERS BELOW

The August 8, 1996 opinion of the court of appeals is reported at 91 F.3d 1529 and reproduced in the Appendix at

1a-34a.[1] The court of appeals' January 31, 1997 order denying rehearing and rehearing *en banc* is unreported and is reproduced at 35a. The district court's opinion dated July 7, 1995 granting partial summary judgment is reported at 887 F. Supp. 682 and is reproduced at 36a - 50a. The district court's order enjoining continued operation of the J&H Directors retirement policy is unreported and is reproduced at 51a - 53a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C § 1254(1). The decision of the court of appeals was entered on August 8, 1996. A timely petition for rehearing by petitioner was denied on January 31, 1997, and this petition is being filed within 90 days of that date.

STATUTORY PROVISIONS INVOLVED

This case involves the application of Fed. R. Civ. P. 56 in the context of a claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* The relevant sections of the ADEA involved in this case, §§ 623(a)(1), 623(f)(1), 630(b) and 630(f), are set forth below.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

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[1] The Appendix to this Petition is cited "___a". The Joint Appendix in the court of appeals is cited "JA ___."

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

* * *

§ 630. Definitions

For purposes of this chapter —

* * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * *

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

STATEMENT OF THE CASE

A. Statement of Facts

1. The Directors of Johnson & Higgins

At the time of the decision below, J&H was a closely held corporation engaged in a global insurance brokerage and employee-benefits consulting business headquartered in New York City. The firm was incorporated under New Jersey law in 1899; its predecessor firm was a partnership that had been in continuous existence since 1845. (JA 470.) As of May 1992, when the EEOC commenced the administrative proceeding that preceded this lawsuit, J&H and its subsidiaries had 64 branch offices in the United States and Canada, 44 offices overseas, and more than 8000 employees. (JA 471.) As described above (p. ii), the stock of J&H was recently purchased by Marsh & McLennan Companies, Inc., and J&H is now a subsidiary of that company.

Until its recent acquisition, J&H was owned and managed by the members of its Board of Directors. J&H's certificate of incorporation (JA 95-105; the "Charter") and by-laws (JA 107-16) provided that the firm would be managed by the Board of Directors, who were the firm's senior managers and who collectively owned all but a small amount of the firm's capital stock. With exceptions not relevant here, the Charter provided that no person could sit on the Board unless he or she was a stockholder, and that no one could own stock unless he or she

was actively engaged in the firm's service.[2] As is described in more detail below, Board members purchased stock upon their election to the Board, received additional shares during their tenure as Directors and sold their stock back to the firm when they left the Board.

J&H's Charter and by-laws limited the number of Directors to a maximum of 44. (JA 470-71.) When this lawsuit began, there were 35. (JA 471.) Those 35 people were the owners and senior managers of J&H's entire global enterprise.

2. Director Compensation and Stock Holdings

Directors' compensation was tied directly to the firm's profitability. The Charter provided that each year half of the corporate profits — the Directors' Salary Pool — would be distributed to the Directors. (JA 103.) A Compensation Committee comprised of between one-third and one-half of the Board members met annually to prepare a recommendation to the full Board for division of the Salary Pool among the Directors. The Committee recommended participation percentages for each Director, which were then submitted to the full Board for approval. During the year the Directors

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[2] Beginning in 1993 the Board issued some stock to a limited number of key employees, but the percentage they held was small. (JA 472.) Since 1994, the Charter and by-laws had permitted election to one-year terms of up to six non-stockholder Directors, to allow persons associated with J&H's foreign affiliates to serve on the Board. Those Directors were not compensated in the same way as stockholder Directors (*see* pp. 6-8), and they were not subject to the retirement plan challenged herein. (JA 471-72.)

received a uniform monthly draw that at year-end was charged against their participation in the Salary Pool. (JA 477-78.)

In addition, the Board annually declared a dividend from the remaining corporate profits, and Directors received dividends on whatever portion of their stock was dividend-paying. Upon election to the Board, new Directors purchased 500 shares of stock at a relatively nominal price. Those shares paid dividends immediately. Directors were given the opportunity to purchase additional shares during their tenure on the Board (also at a relatively nominal price) as recommended by the Compensation Committee and approved by the Board. Those shares, however, generally did not become dividend-paying for as long as ten years because, as discussed below, the firm was paying so-called "dividend-equivalents" to the former Directors who previously held the stock. (JA 478-80.)

When a Director left the Board for any reason, his or her stock had to be sold back to J&H. J&H and the departing Director entered into a purchase contract under which J&H agreed to pay the former Director amounts equivalent to the dividends that would have been paid to the Director had he or she continued to hold the stock. These dividend-equivalents were paid for the year of the Director's departure (pro-rated for the Director's period of service during the year) and for each of the next ten years. In conjunction with the purchase contract, J&H and the retiring Director also entered into a consultancy and non-competition agreement, and J&H's obligations under the purchase contract were expressly subject to the former Director's compliance with that agreement. The purchase contract and the consulting and non-competition agreement were collectively referred to as the "Ten-Year Contract." (JA 479-80.)

The stock that retiring Directors surrendered was reissued to current Directors, as approved by the Board. The stock did not pay dividends to its new holders, however, until the former holder had been paid all of the dividend-equivalents under the Ten-Year Contract. If a Director owned stock when he left the Board that did not yet pay dividends, payment of the dividend-equivalents under the Ten-Year Contract commenced when the underlying stock, if it had not been surrendered, would have become dividend-paying. (JA 480.)

3. The Directors' Retirement Policy

The retirement policy that is the subject of this lawsuit was adopted by unanimous Board vote in November 1983. The policy required that beginning in 1984 Directors retire at the earlier of (a) the end of the year in which the Director reached age 62 or (b) the end of the year in which he or she reached age 60 and completed 15 years of service on the Board. With respect to (b), in cases of corporate need determined by the Chairman and approved by the Executive Committee, a Director could continue on a year-to-year basis up to but not beyond the end of the year in which he or she reached age 62. (JA 501-02.)[3]

The retirement policy applied only to Directors. J&H never had a mandatory retirement policy for non-Directors, not even for executives and high policy makers who could lawfully

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[3] Because J&H is now a subsidiary of Marsh & McLennan Companies, Inc., the Directors' retirement plan is no longer in operation. The issues presented by this petition are not moot, however, because the EEOC is seeking money damages with respect to certain retirements under the plan.

have been required to retire at age 65 pursuant to Section 12(c)(1) of the ADEA, 29 U.S.C. § 631(c)(1).

The retirement policy that was adopted in 1983 had been under discussion among the Directors for a number of years. (JA 483.) Prior to 1984 there had been no retirement policy, although there had been an informal understanding among the Directors that a Director would retire from the Board at the end of the month in which he or she reached age 62, with provision for extension in certain circumstances to the end of the year in which he or she turned 65. That understanding had not been consistently followed. In the preceding ten years eight of the fourteen Directors who retired did so after age 62. (JA 481.)

The Directors considered the new policy necessary to permit more orderly planning for succession and transfer of responsibility and also to make stock allocation fairer and more predictable. (JA 483-84.) Stock was not issued to Directors with the expectation that they would own it indefinitely, but rather to provide them a certain period of stock-related payments. In order to plan the stock-related payments to present and retired Directors, the Directors had to know at the time stock was allocated when the Director to whom it was allocated would retire. If they did not, they could not be sure of the distribution between dividend payments and dividend-equivalent payments with respect to stock they were allocating. A Director who retired on schedule at the end of 1994, for example, would have been entitled to dividend - equivalents for ten years, from 1995 through 2004, and thereafter the active Director or Directors to whom the stock had been reissued would begin receiving dividends on the stock. If the scheduled retirement were delayed for a year, the Director would have

received for 1995 the same amount in dividends as he or she would have received in dividend-equivalents had he or she retired on schedule, but 2005 would have been added as an additional year in which dividend-equivalents would be paid, and there would have been one less year of dividends than had been scheduled for active Directors.

The Directors' desire to plan their succession and compensation rationally and predictably counseled in favor of a policy that would be subject to exception only in cases of true corporate need and would use as early an age as was reasonable under all the circumstances. (JA 483-84.) The Directors concluded that age 60 made sense from a financial planning point of view because the ten years of dividend-equivalents would then end at the time the Director would have to start withdrawing the monies in his or her Section 401(k) cash-accumulation plan account. (JA 484.) *See* 26 U.S.C. § 401(a)(9)(C)(i).

The Directors further concluded that age 60 made sense because, if history were a guide, a retirement age of 60 would yield an average period of Board service of about 15 years. The Directors considered that if a Director reached age 60 with 15 years of Board service behind him or her, it was time to step aside and give someone else at J&H the extraordinary opportunity that a J&H Directorship represented. If such a Director had made no more than an ordinary contribution to the firm in those 15 or more years, the firm would likely benefit from his replacement. But even if the Director's contribution had been stellar, the Directors believed that for the good of their firm no one should be considered (or be allowed to consider himself or herself) indispensable and that the need to replace even the best people encourages

organizational discipline. Furthermore, such a Director's experience and wisdom would continue to be available to J&H during the ten-year consultancy period. (JA 484-85.)

Finally, where a Director had been on the Board for less than 15 years, the Directors thought that age 62, the age historically (if somewhat flexibly) used, was appropriate. (JA 485.)

B. The Proceedings Below

1. The District Court's Opinion

The EEOC filed suit against J&H on August 5, 1993, alleging that the Directors' retirement policy violated the ADEA because it required Directors to leave the Board before age 65.[4] Following discovery limited by agreement to the issue

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[4] The EEOC's suit was not brought at the behest of any Director. No Director sought to challenge the retirement policy, and all of the Directors who retired under the policy during the period covered by the EEOC's suit submitted sworn affidavits to the district court stating that they did not wish the EEOC to proceed with its suit. (JA 407-66.) The EEOC learned of the retirement policy when a former Director, Burt N. Sempier, whose previously-tendered resignation the Board had accepted, filed an age-discrimination charge against J&H. (JA 19 at ¶ 4.) That charge was not based on the retirement policy; Mr. Sempier left the Board two and one-half years before his scheduled retirement date.

The EEOC terminated its investigation and processing of (continued...)

of J&H's liability, the EEOC moved for summary judgment on that issue. (JA 9-10.) J&H opposed the motion on several grounds, including (i) that the ADEA did not apply to the retirement policy because the J&H Directors were not "employees" within the meaning of the ADEA for purposes of that policy and (ii) that the policy, although tied to age, was nevertheless based on reasonable factors other than age and thus was not prohibited by the ADEA in any event.

The district court granted the EEOC's motion in an opinion issued on June 12, 1995. The district court held that the Directors were employees for ADEA purposes, despite recognizing that "[the] Directors not only control and manage the business, but they also are 'co-owners' of the corporation, jointly holding all but a tiny fraction of its stock" (44a). The court held that J&H's argument that the Directors, as the owners and managers of the business, were not employees was barred by the Second Circuit's 1986 decision in *Hyland* v. *New Haven Radiology Assocs.*, 794 F.2d 793 (2d Cir. 1986). (45a.) In *Hyland*, the Second Circuit stated that the prohibitions of the ADEA "do not extend to those who properly are classified as partners ... [because] of their unique status as business owners and managers," *id.* at 797, but held that in the case of a

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[4](...continued)

Mr. Sempier's charge in April 1992 and commenced the present litigation on its own shortly thereafter. (Mr. Sempier subsequently filed a lawsuit against J&H in the District Court for the District of New Jersey. The trial of that suit resulted in a jury verdict for J&H on Mr. Sempier's age-discrimination claims in January 1997 and subsequent dismissal by the trial court of a final cause of action reserved by the court for decision.)

corporation the ADEA applies to any person "employed" by a corporation, irrespective of his or her status as an owner and manager, *id.* at 798.

The district court rejected J&H's RFOA defense on the basis of an EEOC interpretation of the ADEA, 29 C.F.R. § 1625.7, providing that the defense is never available "[w]hen an employment practice uses age as a limiting criterion." (41a-42a.) The district court was unpersuaded by J&H's argument that the EEOC's interpretation effectively writes the RFOA out of the ADEA because if a practice does not "use age as a limiting criterion" it cannot have been taken "because of age," and there would be no occasion to assert an RFOA defense.

2. The Court of Appeals' Opinions

a. The Majority Opinion

The court of appeals affirmed the district court's summary judgment by a two to one majority. The majority reaffirmed the *Hyland* decision, holding that what it called the "partnership exemption" is limited to "actual *de jure* partnerships and [will] not be extended to closely-held corporations or other organizations whose structure resembles that of a partnership." (15a.) The majority stated that *Hyland* did not preclude an argument that the J&H Directors "should be exempt from the ADEA on account of their position as [statutory] *directors*" (17a) (emphasis in original), and that "[d]irectors who do not possess the common law indicia of employment are clearly not 'employees'" (18a). In determining whether the Directors possessed the common law indicia of employment, however, the majority declined to apply common law principles, which the majority acknowledged "require[] a broad examination of the totality of the circumstances." (*Id.*)

Instead, the court adopted "a more manageable three-factor test: (1) whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether that director reported to someone higher in the hierarchy." (*Id.*)

The majority concluded that the J&H Directors met each of these criteria and held, "[b]ecause all three of these prongs are satisfied in this case, we conclude that, as a matter of law, J&H's directors are also 'employees' for purposes of the ADEA." (19a.) The majority "attach[ed] no particular significance to the fact that a director's employment by J&H is 'but an aspect of the fundamentally entrepreneurial relationship that the Directors have amongst themselves and to the firm as a whole.'" (20a.)

With regard to J&H's RFOA argument, the majority stated that it had "no reason to doubt J&H's assertion that its policy was an attempt to achieve orderly succession and turnover among directors." (23a.) The majority considered, however, that "the question of J&H's assertedly benign intentions — J&H's claim that it did not intend to invidiously discriminate on the basis of age — [was] irrelevant" (*id.*) and held that the RFOA defense is available only in cases where the challenged policy is "age-neutral" on its face. (22a.)

b. The Dissenting Opinion

Judge Jacobs dissented from the decision below, reasoning that the Directors are employers rather than employees for purposes of their retirement policy. (28a.) Judge Jacobs considered that while the three factors the majority applied "may be relevant to ascertaining employment status ... they cannot be dispositive." (29a.) Rather, Judge Jacobs considered

that "[e]mployment status is to be determined based on the 'economic reality' of the relationship between the individual and the firm as respects the challenged practice or decision." (29a) (quoting this Court's decision in *Goldberg* v. *Whitaker House Cooperative*, 366 U.S. 28, 35 (1961)).

In Judge Jacob's view,

> "[b]ecause they own and control the company, J&H's directors should be considered employ*ers* — not employ*ees* — for the same reasons that a general partner is considered 'a business owner[ ] and manager[ ],' not an employee.
>
> * * *
>
> [I]t is true that J&H's directors do some things that employees do. But what is relevant here is that they alone hold all the legal and financial power to direct the corporation's acts. The challenged retirement policy is one that only the directors have the power to adopt. It affects only themselves; it impacts equally and without discrimination on each; and it is part of a comprehensive contractual arrangement governing the stock ownership, management succession, and economic destiny of J&H." (33a-34a) (emphasis in original) (citations omitted).

REASONS FOR GRANTING THE WRIT

The majority's decision is contrary to this Court's repeated decisions holding that the term "employee" in federal legislation is to be construed as referring to the conventional master-servant relationship and that the determination of whether a person is an employee must be made with reference to the economic reality of the business enterprise in which he or she is engaged. Under those principles, individuals who jointly own and manage a business are not employees, irrespective of the form of their business. The majority's decision directly conflicts with decisions of three other courts of appeals construing the meaning of the term "employee" for purposes of the federal discrimination statutes, and it raises an issue of substantial public importance, especially in view of the increasing trend toward incorporation of enterprises such as law and accounting firms that have traditionally been organized as partnerships.

The majority's interpretation of the ADEA's "reasonable factors other than age" provision effectively reads the provision out of the act. The nullification of a statutory provision raises an issue of clear importance for this Court.

I.

The J&H Directors Were Not Employees for Purposes of the ADEA.

A. The Panel's Decision Is Contrary to This Court's Decisions Construing the Term "Employee" in Federal Legislation.

The ADEA's prohibitions (to the extent relevant here) apply only to practices of employers with respect to their employees. 29 U.S.C. § 623(a). The ADEA itself, however, provides no useful definition of the term "employee." It defines an employee simply as "an individual employed by an employer." 29 U.S.C. § 630.

This Court has repeatedly held that where, as in the case of the ADEA, a federal statute does not helpfully define "employee," the term is to be understood as referring to "'the conventional master-servant relationship as understood by common-law agency doctrine.'" *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318, 322-23 (quoting *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 739-40 (1989)). Furthermore, the Court has said that in determining employment status, the "economic reality" of the relationship must be considered, not "technical concepts." *Goldberg* v. *Whitaker House Cooperative*, 366 U.S. 28, 33 (1961). As the Court stated in *Darden*, "the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer[;] *all* of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 503

U.S. at 324 (emphasis added) (quoting *NLRB* v. *United Ins. Co. of America,* 390 U.S. 254 (1968)).

Under these principles, individuals who both own and manage a business are not employees. Justice Powell made that clear in his concurring opinion in *Hishon* v. *King & Spalding*, 467 U.S.69, 79-80 (1984), a Title VII case involving a law partnership.[5] Justice Powell stated that the relationship between partners differs from that between employer and employee because, *inter alia*, "[t]he essence of the law partnership is common conduct of a shared enterprise." Similarly, the court below recognized in its *Hyland* decision that it is "by reason of their unique status as business owners and managers" that partners are not employees, 794 F.2d at 797, and the EEOC itself has held that partners are "not employed by the partnership [because] they are the co-owners who control and manage the business." EEOC Decision No. 85-4, Emp. Prac. Guide (CCH) ¶6846, at 7040 (March 18, 1985).

There is no justification for treating the owners and managers of an incorporated business differently from *de jure* partners. The ADEA does not contain a "partnership exemption," as the majority phrased it. (15a.) Partners are exempt from the ADEA's proscriptions not because they are partners, but because as the owners and managers of a business they are not employees. Those who own and manage a

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[5] The ADEA was modeled on Title VII, *see McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S.Ct. 879,884 (1995), and the definitions of "employee" and "employer" are substantially identical in both statutes. *Compare* 29 U.S.C. §§ 630(b), (f) (ADEA) *with* 42 U.S.C. §§ 2000e (b), (f) (Title VII).

corporation are no more the employees of their corporation than partners are employees of their partnership.

The majority's "more manageable" three-factor test plainly is not equivalent to the common law test mandated by this Court's decisions. No partnership having more than a few members — and thus requiring some sort of hierarchy — would pass the test, but it is common ground that they are not employees under common law principles.[6] The three factors the majority used may be relevant in many cases to determining whether a person is an employee, but they cannot be dispositive in all cases, and certainly not in this one. As the dissenting judge stated, "[b]y definition, any inquiry based on economic reality cannot be limited to three yes or no questions" (29a).

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[6] Consistently with the economic reality test, some courts have held *de jure* partners may be considered employees for purposes of the ADEA if they are not in reality the owners and managers of the business. *See, e.g., Simpson* v. *Ernst & Young*, 100 F.3d 346, 443-44 (6th Cir. 1996), *petition for cert. filed*, No. 96-1533 (April 1, 1997) (holding a nominal partner an "employee" for ADEA purposes because he had no meaningful participation in the ownership or control of the business). It is economic reality, not organizational form, that determines whether a person is an "employee" under the ADEA. A nominal partner who is in reality not an owner-manager is an employee for ADEA purposes. A person who works within a corporate enterprise — and who is thus nominally an employee of the corporation — is not an employee for ADEA purposes if he or she is in fact an owner-manager.

The majority itself acknowledged that the determination of whether a person is an employee under common law principles "require[s] a broad examination of the totality of the circumstances." (18a.) The majority's holding that its three-part test determines employment status as a matter of law has led to the absurd result that liability has been found in a case where, as the dissent expressed it, "[t]he supposed victims are the architects of [the] arrangement" that has been held to victimize them (27a).

B. The Decision Below Conflicts With the Decisions of Three Other Courts of Appeals.

Each of the three other courts of appeals that have considered whether the owner-managers of closely held corporations are employees for purposes of federal employment discrimination statutes has held that the test applicable in determining whether partners are employees — whether they are in reality the owners and managers of the business — is equally applicable in the case of corporations. The Second Circuit's holding to the contrary here makes it important for this Court to resolve the circuit split on this issue.

In *EEOC* v. *Dowd & Dowd,* 736 F.2d 1177 (7th Cir. 1984), the Seventh Circuit affirmed the grant of summary judgment holding that the shareholders of a professional corporation were not employees for purposes of Title VII. The court relied on a prior decision involving a partnership in which it had stated, "we do not see how partners can be regarded as employees rather than as employers who own or manage the operation of the business." *Id.* at 1178 (citation omitted). The court rejected the EEOC's argument that the

earlier decision was inapplicable because it involved a *de jure* partnership rather than a professional corporation, stating

> this distinction is of little value to Title VII purposes.
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> * * *
>
> The economic reality of the professional corporation . . . is that the management, control and ownership of the corporation is much like the management, control and ownership of a partnership. We therefore see no reason to treat the shareholders of a professional corporation differently for purposes of Title VII actions than we did the partners of the accounting firm.

Id.

Similarly, in *Fountain* v. *Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991), the Eleventh Circuit affirmed the grant of summary judgment holding that the shareholders of a professional corporation were not employees for ADEA purposes. The court expressly rejected the Second Circuit's holding in *Hyland* as an "exaltation of form over substance," stating that the question of whether a shareholder was an employee depended "not on any label, but on the actual role played ... in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership." *Id.* at 1400-01.

Most recently, in *Devine* v. *Stone, Leyton & Gershman,* 100 F.3d 78 (8th Cir. 1996), a case now before this Court[7], the Eighth Circuit affirmed a district court's finding that the shareholders of a professional corporation were not employees for Title VII purposes. The *Devine* court expressly disagreed with the majority's decision in this case, adopting instead the approach of *Fountain* and *Dowd*, which "examines the actual circumstances to determine whether an individual functions like a partner. Individuals acting like partners will not be classified as employees because partners own and manage a firm." *Id.* at 80. The court further stated, "In deciding whether the shareholder-directors are employees or employers, we look to the extent to which they manage and own [the business]. If the shareholder-directors manage and own [the business], they should not be counted as employees . . . . All relevant factors must be examined; any one may not be decisive in deciding whether an individual is an employee." *Id.* at 81 (citations omitted).

The need for this Court's resolution of the issue raised here is particularly urgent in light of the recent and accelerating growth in the number of limited liability companies ("LLCs"), which are hybrids of the corporate and partnership forms, as J&H was. *See* Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 Bus. Law. 1, 2 (1995). Since 1988 when the Internal Revenue Service first classified such entities as partnerships for tax purposes, the total number of new LLC filings has gone from 1700 in the eight states recognizing LLCs in 1991, to 64,000 new filings

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[7] A petition for certiorari has been filed in *Devine*. No. 96-1423 (March 7, 1997).

in forty-four states and the District of Columbia in 1994, to 115,000 in forty-eight jurisdictions in 1995. As of December 31, 1995, more than 210,000 business entities had chosen the LLC form in the eight years since the 1988 IRS ruling. Susan P. Hamill, *The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question*, 95 Mich. L. Rev. 393, 440-46 (1996). It is likely that the proper treatment of owner-managers of such corporations under the federal employment discrimination laws will remain an ongoing subject of litigation until resolved by this Court.

II.

The Directors' Retirement Policy Did Not Violate the ADEA Because It Was Based On Reasonable Factors Other Than Age.

Section 4(a) of the ADEA makes it unlawful for an employer to take specified actions "because of [an employee's] age." 29 U.S.C. § 623(a)(1). Section 4(f)(1), however, provides that "[i]t shall not be unlawful for an employer to take any action otherwise prohibited under [Section 4(a)] . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Thus, even though an action is taken "because of age," it is not unlawful if it is "based on reasonable factors other than age."

The text of the ADEA and its legislative history make clear that the RFOA provision, although seemingly oxymoronic, was purposeful and that the RFOA provision reflects a Congressional intent not to prohibit the use of age in employment decisions provided the decision is not based on arbitrary judgments about the capabilities of older workers. In enacting the ADEA, Congress stated that the purpose of the

statute was to prohibit "*arbitrary* age discrimination in employment," 29 U.S.C. § 621(b) (emphasis added). The intention to limit the ADEA's prohibitions to arbitrary discrimination is evident throughout the ADEA's history. In deliberations prior to enacting Title VII of the Civil Rights Act of 1964, Congress considered including a prohibition of age discrimination in that statute. Congress ultimately decided not to do so, but directed the Secretary of Labor to study the issue of age discrimination and report on his findings. Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964). The Secretary made his report in 1965. *See* Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (June 1965), *reprinted in* EEOC, Legislative History of the Age Discrimination in Employment Act, at 16-41 (1981) ("Legislative History"). In the "Conclusions and Recommendations" section of that report the Secretary wrote:

> The firmest conclusion from this year long study is that the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as "arbitrary" and to concentrate on the prohibition of practices which include this element.

Legislative History, at 37.

The bill Congress passed as the ADEA was submitted to Congress by the Secretary of Labor on behalf of the President in early 1967, and the Secretary made clear that the bill would prohibit only "arbitrary age discrimination." *See* Letter from W. Willard Wirtz, Secretary of Labor, to Hon. John W. McCormack, Speaker of the House (Jan. 23, 1967), *reprinted*

in Legislative History, at 62-63. The Secretary's letter accompanying the bill refers repeatedly to *arbitrary* discrimination and states: "The Legislation would clearly indicate that the prohibitions are designed to bar arbitrary age discrimination. Reasonable differentiations not based solely on age, including but not limited to bona fide occupational qualifications which may be reasonably necessary to the normal operation of a particular business, would not fall within the proscription." *Id.*

Furthermore, the ADEA's legislative history shows that the RFOA defense has been joined from the beginning with the so-called BFOQ defense (bona fide occupational qualification). H.R. 13054, 90th Cong., 1st Sess. § 4(f)(1) (1967), *reprinted in* Legislative History, at 94. The BFOQ defense renders lawful an action taken "because of age" in violation of Section 4(a) if the discrimination is not arbitrary because age is a bona fide occupational qualification. Similarly, the RFOA language is intended to render lawful any other action taken "because of age" if the full facts show that the action was not arbitrary because it was really "based on reasonable factors other than age."

As discussed above (pp. 8-10), and as the majority acknowledged (23a), the J&H Directors retirement policy, although tied to age, was not based on judgments about the capabilities of older workers, but rather on the Directors' need to plan their own compensation and succession in an orderly fashion. It was not arbitrary stereotypes about age but those reasonable factors other than age that formed the real basis for the policy at issue here.

The majority rewrites and effectively eviscerates the RFOA defense by holding that it is only available with respect to decisions that are "age-neutral." If that were so, the defense would never be necessary, and the RFOA language would be surplusage. A decision that is age-neutral by definition cannot have been taken "because of age." It would not violate Section 4(a), and there would be no occasion for a defense under Section 4(f)(1). Plainly, an interpretation that effectively negates a statutory provision is unacceptable. *See Bennett* v. *Spear*, ___ U.S. ___, 117 S. Ct. 1154, 1166 (1997) ("cardinal principle of statutory construction [is to] give effect, if possible, to every clause and word of a statute ...") (quoting *United States* v. *Menasche*, 348 U.S. 528, 538 (1955)).

The interpretive regulations initially promulgated under the ADEA by the Secretary of Labor in 1968 demonstrate that the agency then charged with enforcing the ADEA understood that the RFOA provision was not meaningless. The initial regulation concerning the RFOA defense stated in pertinent part:

> (b) No precise and unequivocal determination can be made as to the scope of the [RFOA] phrase. Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.
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> * * *
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> (d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept, with unusual working conditions given weight according to their individual merit.

29 C.F.R. § 860.103 (1969). These regulations, although general, are consistent with Section 4(f)(1) and recognize that Congress' intent was to establish a principle to regulate situations whose precise contours it could not foresee.[8]

The majority's reliance (23a) on this Court's decision in *City of Los Angeles, Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978) is misplaced. *Manhart* involved a challenge under Title VII to an employer's policy of requiring larger pension contributions from female employees than male employees because of the statistically greater longevity of women. The Court held that the policy violated Title VII's prohibition of sex discrimination and rejected the employer's argument that the policy was based on longevity not sex. Although decisions under Title VII are relevant in many respects to ADEA cases, that is not so with respect to the RFOA provision for the simple reason that Title VII has no analogous provision. Whereas the ADEA provides that actions

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[8] The EEOC, which succeeded the Department of Labor as the agency responsible for enforcing the ADEA, has consistently attempted to eliminate the RFOA by regulation. In 1981, the EEOC adopted a new interpretation of the RFOA language, which reads:

> (c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable. 29 C.F.R. § 1625.7.

As with the majority's interpretation below, the EEOC's interpretation negates the statutory provision, reading it out of the law altogether. If an action does not "use[] age," it cannot be said to have been taken "because of . . . age" in the first instance, and there would be no occasion for an RFOA defense.

taken because of age are not unlawful if they are based on reasonable factors other than age, there is no provision of Title VII providing that decisions made because of sex (or any other characteristic protected under Title VII) are nevertheless lawful if based on other reasonable factors.[9]

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[9] The EEOC argued below that Congress intended the RFOA defense to be available only in the context of a disparate impact claim. (*See* Brief of Appellee The Equal Employment Opportunity Commission at 23.) The majority did not adopt that position, and nothing in the text of the ADEA supports it. Indeed, it is not clear whether Congress even intended that disparate impact claims would be available under the ADEA. *See Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

Respectfully submitted,

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April 30, 1997

APPENDIX

APPENDIX

A. Opinion of the Court of Appeals for the Second Circuit Affirming the District Court's Grant of Summary Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1208 August Term, 1995

(Argued: March 4, 1996 Decided: Aug. 8, 1996)

Docket No. 95-6216

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

JOHNSON & HIGGINS, INC.,

Defendant-Appellant.

Before: MINER, JACOBS, and CABRANES, *Circuit Judges.*

Interlocutory appeal from order of the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*), granting partial summary judgment to plaintiff-appellee on the ground that defendant-appellant's mandatory retirement policy for its Board of Directors violates the Age Discrimination in Employment Act ("ADEA") and enjoining defendant from further enforcement of the discriminatory policy. On appeal, defendant-appellant argues that (1) the Equal Employment Opportunity Commission ("EEOC") did not satisfy its statutory duty to conciliate; (2) the EEOC did not have the power to enforce the ADEA where no aggrieved members of the Board of Directors filed charges or supported the suit; (3) the ADEA is inapplicable because the directors were not "employees" for purposes of the statute; (4) even if the ADEA is applicable, the retirement policy does not violate ADEA because the policy is based on reasonable factors other

than age; and (5) the district court abused its discretion in entering the injunction.

Affirmed.

Judge Jacobs dissents in a separate opinion.

JOHN F. CANNON, New York, New York (Robin D. Fessel, Sullivan & Cromwell, Andrew D. Rotstein, of counsel), *for defendant-appellant.*

KAREN M. MORAN, Equal Employment Opportunity Commission, Washington, D.C. (C. Gregory Stewart, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Equal Opportunity Commission, Washington, D.C.), *for plaintiff-appellee.*

JOSÉ A. CABRANES, *Circuit Judge:*

The question presented is whether the Age Discrimination in Employment Act of 1967 (the "ADEA" or "the Act"), 29 U.S.C. § 621 *et seq.,* is applicable to a firm's mandatory retirement policy for its Board of Directors where the directors are also full-time employees of the firm. Defendant-appellant Johnson & Higgins, Inc. ("J&H") appeals from a July 7, 1995, order of the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*) granting summary judgment in favor of the Equal Employment Opportunity Commission ("EEOC") based on its finding that J&H's retirement policy for members of its Board of Directors violated the ADEA, and enjoining J&H from further enforcement of the policy.

I. Background

The following facts — drawn primarily from the district court's opinion — are undisputed. *See EEOC v. Johnson & Higgins, Inc.,* 887 F. Supp. 682 (S.D.N.Y. 1995). J&H, an

international insurance brokerage and employee benefits consulting firm, is a private corporation incorporated under New Jersey law with its principal place of business in New York City. Its charter and by-laws provide that the firm be managed by a Board of Directors ("the Board") consisting of at least twenty and no more than forty-four members. When the EEOC brought the present action in May 1992, J&H had thirty-five directors.

J&H's directors are nominated by the Chairman of the Board after consultation with other members, and must be elected by a two-thirds majority of the entire Board. Candidates are chosen exclusively from among the officers and senior managers of J&H or its subsidiaries. According to Board policy, a director is selected based on (1) his outstanding performance in senior managerial positions and (2) the Board's belief that his ability to contribute to J&H "in his or her current and possible future roles would be significantly enhanced by the added authority and status that a Directorship at J&H entails." A new director is required to tender a letter of resignation to become effective at the pleasure of two-thirds of the Board.

Although the J&H directorship is characterized somewhat differently by each party, it is undisputed that a person continues to perform his duties as an officer of J&H after he has been named a director. In a letter to the EEOC regarding the instant matter, J&H described a director's role as follows:

> [Directors] are given the opportunity to become owner-managers of J&H because the existing owner-managers believe that as Board members they will contribute in a material way to the future success of the firm. By whatever route an individual becomes a Director, the understanding is *that he will continue in J&H's active service as an officer and employee of J&H or one of subsidiaries.*

(Emphasis added.) Directors receive certain new duties as a result of their election to the Board, including mandatory service on various committees and attendance at Board

meetings. J&H emphasizes that an officer's position at the firm is altered in many intangible ways by elections to the Board. Gardner Mundy, the General Counsel and Senior Vice President, notes:

> [A]t J&H when someone becomes a Director, and thus a member of the relatively small group that owns and manages a world-wide organization employing over eight thousand people, virtually everything changes in ways too numerous and subtle to catalog. One's personal stature and credibility within the organization, the prestige associated with one's existing position in the organization, and one's ability to get things done within and without one's particular area of responsibility, are all enormously enhanced. When individuals are offered the opportunity to become Directors of J&H it is because the existing Directors are persuaded that they will contribute to the future success of the firm as Board members in ways they could not as officers and employees only. If status as a Director is accepted, "employment" continues, but it becomes but an aspect of the fundamentally entrepreneurial relationship that the Directors have among themselves and to the firm as a whole.

J&H's directors report to one of the six senior Board members for annual performance reviews. A director's compensation—consisting of a certain percentage of the firm's profits determined annually by the Directors' Compensation Committee—is based primarily on these individual performance reviews.

According to its charter, J&H shares may not be owned by any person "other than an individual who is an officer, director or employee of the Corporation and actively engaged in its service." Indeed, J&H stock is owned almost exclusively by its directors.[1] Under the firm's by-laws, each J&H director

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[1] Since 1993, the Board has issued a small percentage of its stock to a few key employees who are not directors.

must own at least 500 shares of J&H stock, and a director who ceases to own 500 shares automatically loses his seat on the Board. Additional stock is also made available to individual directors during their tenure. If a director leaves the Board for any reason, including retirement, he is required to surrender his stock, which is then allocated to the others.

A retiring director must surrender his stock pursuant to a purchase contract and consulting and non-competition agreement referred to by J&H as the "Ten-Year Contract." Under this contract, J&H promises to pay the retiring director the equivalent of the dividends that would have been payable for the next ten years if the director had continued to hold the stock, and the outgoing director promises not to compete with J&H and to be available as a consultant if necessary. When a director retires pursuant to this policy, he not only ceases to be a director, but he also ceases to be a stockholder, officer, and employee of the company. According to Mundy, "retirement as a director entails retirement in all other capacities as well."

J&H's mandatory retirement policy for its Board of Directors—adopted unanimously by the Board in 1983 by an amendment to the by-laws—provides that:

> the normal retirement date for Directors [shall] be the earlier of (a) the end of the year in which the age 62 is attained or (b) the end of the year in which age 60 is attained and 15 years of service on the Board is completed. With respect to (b), in cases of corporate need determined by the Chairman and approved by the Executive Committee, a Director may continue on a year-to-year basis up to but not beyond the end of the year in which age 62 is attained.

The EEOC first became aware of J&H's mandatory retirement policy when a director, forced to resign for reasons unrelated to the policy, filed a charge of age discrimination. In the course of its investigation, the EEOC learned of the mandatory retirement policy, and on May 21, 1992, it informed J&H that it was under investigation for its alleged violation of the

ADEA. Although no retired or current directors claimed to be aggrieved by the alleged discriminatory practices, the EEOC pursued the ADEA investigation on its own initiative. On June 19, 1992, an EEOC investigator informed J&H's counsel that the EEOC had determined that J&H's mandatory retirement policy violated the ADEA.[2] On July 2, 1992, at J&H's request, its representatives met with Harold Wilkes, an EEOC enforcement manager, and with Kevin Marrazzo, an EEOC trial attorney, to discuss the allegations. The EEOC issued a "Letter of Determination" on July 8, 1992, indicating that it found reasonable cause to believe that J&H's mandatory retirement policy for directors violated the ADEA, and inviting J&H, pursuant to 29 U.S.C. § 626(b), to "conciliate" the matter to avoid a lawsuit. In a letter dated July 23, 1992, J&H reiterated its position that its retirement policy did not violate the ADEA:

> [W]e may make a formal request that you reconsider your Letter of Determination on the ground that, although under the challenged policy a retiring Director's employment terminates along with his directorship and stock ownership at age 60 (or 62), the policy is driven by the directorship and stock-ownership factors and thus involves a "differentiation based on reasonable factors other than age" (ADEA, Sec. 4(f)(1)). At this point, however, J&H is willing to conciliate if some basis can be found that will both vindicate the Commission's interpretation of the ADEA and accommodate J&H's desire to manage its directorships and stock ownership in accordance with the needs of its business, as it has since the J&H partnership incorporated itself under New Jersey law In 1899.

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[2] Pursuant to 29 U.S.C. § 631(c)(1), it would be permissible for J&H to require mandatory retirement at *age 65* for employees who hold executive and policy making positions for the two years prior to retirement and are entitled to immediate, non-forfeitable annual retirement benefits over $44,000.

In a letter to J&H, dated September 15, 1992, the EEOC outlined its procedures and requirements for conciliation, including a request for the production of the records of former directors' salaries. J&H responded by letter on September 16, 1992, indicating that it did not regard the EEOC's September 15 letter as "an acceptable response from an agency of the United States to a corporate citizen whose almost one-hundred-year-old arrangements for the governance of its ownership and management affairs are being challenged by the agency." In a letter dated December 8, 1992, the EEOC again sought information necessary for conciliation; J&H responded that it was "unwilling" to provide the "exact" information.

The EEOC commenced this action on August 5, 1993, alleging that the Board's mandatory retirement policy for directors violated the ADEA and seeking, *inter alia,* a permanent injunction enjoining J&H from enforcing the alleged discriminatory practice, and reinstatement, back wages, and prejudgment interest for directors adversely affected by the policy.

In its opinion dated June 12, 1995, the district court granted the EEOC's motion for partial summary judgment on the issue of liability, reserving judgment on the question of damages. *EEOC v. Johnson & Higgins,* 887 F. Supp. 682. First, the court found that the ADEA was applicable to J&H's mandatory retirement policy insofar as J&H's directors were also "employees" for the purposes of the ADEA: "J&H's policy not only forces a Director to give up a directorship at age 60 or 62, but it also terminates one's status as officer and employee of the corporation." *Id.* at 685. Similarly, while recognizing some merit in J&H's argument that its owners-officers-directors should be viewed as *de facto* partners—outside the scope of the ADEA—it ultimately rejected that view, finding that this court's opinion in *Hyland v. New Haven Radiology Associates,* 794 F.2d 793 (2d Cir. 1986), prevented it from inquiring beyond J&H's choice of the corporate form when determining the applicability of the Act. The court was similarly unpersuaded by J&H's argument that its retirement policy was permissible because it was based on

"reasonable factors other than age," *see* 29 U.S.C. § 623(f)(1). The court concluded that this defense was unavailable because J&H's retirement policy used age "as its sole limiting criterion." *Id.*

The district court also concluded that the EEOC (1) was authorized to bring suit challenging J&H's mandatory retirement policy despite opposition by J&H's current and retired directors; and (2) had satisfied its statutory duty to conciliate prior to bringing suit. *Id.* at 688-89. Accordingly, the court entered summary judgment for the EEOC on the issue of liability and granted permanent injunctive relief, enjoining J&H

> from retiring employee-directors at age 60 or 62 pursuant to its present unlawful retirement policy ... ; from requiring new employee-directors to sign and enter into an agreement with [J&H] to retire pursuant to the agreement at any age in violation of the ADEA; [and] from retiring any employee within the protected class pursuant to that employee's age.

The court also directed J&H to "rescind its retirement policy for employee-directors" and "file and serve on [the EEOC] by a date subject to further order of this Court a modified retirement policy for its employee-directors that complies with the provisions of the ADEA."

J&H appeals, arguing that (1) the EEOC did not meet its statutory duty to "conciliate" before bringing suit challenging J&H's mandatory retirement policy; (2) the EEOC had no authority to bring the action because it did not do so on behalf of any current or retired director aggrieved by the policy; (3) the directors' retirement policy is not covered by the ADEA because they are not "employees" within the meaning of the statute; (4) the retirement policy does not violate the ADEA because its differentiation among employees is based on reasonable factors other than age; and (5) in any event, the district court abused its discretion in entering the injunction.

II. Discussion

A. *Standard of Review*

Under 28 U.S.C. § 1292(a)(1), an immediate appeal may be taken from a district court's interlocutory order granting an injunction. To the extent that the district court fully adjudicated the plaintiff's substantive claims in ordering injunctive relief, it is proper for a court of appeals to review the merits of the case "in precisely the same manner as [it] would ... on appeal from a final judgment." *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 633 (2d Cir. 1995).

We review the district court's grant of summary judgment in favor of the EEOC *de novo*, in order to determine whether there is a genuine issue of material fact for trial and whether the EEOC is entitled to judgment as a matter of law. *See Healy v. Rich Prods. Corp.*, 981 F.2d 68, 72 (2d Cir. 1992); *see also Johnson v. New York*, 49 F.3d 75, 78 (2d Cir. 1995). The court's award of injunctive relief may be reversed only for an abuse of discretion or for a clear error of law. *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1214 (2d Cir. 1993).

B. *The EEOC's Statutory Duty to Conciliate*

As a preliminary matter, J&H argues that the EEOC failed to satisfy its statutory duty to attempt conciliation before filing a formal complaint. Pursuant to 29 U.S.C. § 626(b), the EEOC must "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance ... through informal methods of conciliation, conference, and persuasion" before it can institute an action in federal court. The EEOC fulfills its duty to conciliate before initiating litigation if it

> 1) outlines to the employer the reasonable cause for its belief that the employer is in violation of the Act, 2) offers an opportunity for voluntary compliance, and 3) responds in a reasonable and flexible manner to the reasonable attitude of the employer.

EEOC v. New Cherokee Corp., 829 F. Supp. 73, 80 (S.D.N.Y. 1993) (quoting *EEOC v. KDM School Bus Co.*, 612 F. Supp. 369, 374 n.17 (S.D.N.Y. 1985)); *see also EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1169 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Marshall v. Sun Oil Co. (Delaware)*, 605 F.2d 1331, 1337-39 (5th Cir. 1979). If the defendant refuses the invitation to conciliate or responds by denying the EEOC's allegations, the EEOC need not pursue conciliation and may proceed to litigate the question of the employer's liability for the alleged violations. *New Cherokee Corp.*, 829 F. Supp. at 81 (citing *Marshall v. American Motors Corp.*, 475 F. Supp. 875, 878-79 (E.D. Mich. 1979)); *cf. Sun Oil Co.*, 605 F.2d at 1335 (referring to the Secretary of Labor's obligations under the ADEA (prior to the EEOC taking over these obligations) the court stated that "to fulfill his duty to act reasonably under the circumstances the Secretary's conduct when dealing with a repentant wrongdoer will differ from his conduct with an intransigent one."). By the time the obligation to conciliate arises pursuant to 29 U.S.C. § 626(b), the EEOC has already conducted an initial investigation and "has a reasonable basis to conclude that a violation of the [ADEA] has occurred or will occur." 29 C.F.R. § 1626.15(b) (1995). The conciliation period allows the employer and the EEOC to negotiate how the employer might alter its practices to comply with the law, as well as how much, if any, the employer will pay in damages.

The EEOC satisfied its duty to conciliate in the instant case. On July 8, 1992, the agency issued its letter of determination, notifying J&H that it had reasonable cause to believe that its mandatory retirement policy violated the ADEA and inviting J&H "to effect voluntary compliance with the requirements of the Act through informal methods of conciliation." Nevertheless, J&H maintained that its policy did not violate the law. It also refused to accommodate the EEOC's repeated requests for information about the salaries of retired directors in order to negotiate the question of damages. Inasmuch as the EEOC informed J&H of its basis for concluding that the firm's policy violated the ADEA and provided it the opportunity to conciliate, it was not obligated to do more in

the face of J&H's insistence that its policy was not unlawful. Indeed, it was entirely appropriate for the EEOC to end conciliation efforts at that point and file suit so the courts could determine whether J&H's policy violated the Act.

C. *EEOC's Authority to Bring an Action*

J&H argues that because none of its current or retired directors filed a charge with the EEOC challenging the mandatory retirement policy and none supports the EEOC's suit against J&H, the EEOC has no authority to bring the present action. Its argument is twofold: (1) the directors have expressly waived their putative individual claims against J&H under the ADEA, barring the EEOC from bringing suit on their behalf; and (2) the EEOC has no authority to enforce the ADEA under these circumstances.

First, J&H argues that affidavits submitted by its former directors opposing the EEOC's action against the firm constitute valid waivers of any ADEA claim by the directors against their employer. This, J&H claims, bars the EEOC from pursuing the present suit. In support of its argument, J&H points to the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f), as amended, which permits an individual to knowingly and voluntarily waive his right to sue his employer under the ADEA in certain circumstances. The affidavits signed and submitted by J&H's current and former directors, however, do not appear to satisfy the statutory criteria for a valid waiver, as set forth in 29 U.S.C. § 626(f)(1).[3] Notably,

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[3] Section 626(f)(1) provides, in relevant part,

> An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2) [dealing with settlement of formal charges filed with the EEOC], a waiver may not be considered knowing and voluntary unless at a minimum—
>
> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual ...;

(Footnote continued)

the affidavits do not reference the specific rights or claims that the directors purport to waive; nor do they include the required provision permitting revocation of the waiver within seven days. Furthermore, even if we assume that the directors' waivers conform to all statutory requirements and are otherwise valid, the OWBPA specifically provides that "[n]o waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter." *Id.* § 626(f)(4). Accordingly, if the EEOC has the authority to enforce the ADEA where there is no director willing to join the suit (an issue we address below), that authority cannot be altered by a waiver of the rights of a private party—even a private party with a direct interest in the subject of concern to the EEOC.

This brings us to the question of the scope of the EEOC's enforcement authority under the ADEA where no director who has retired under the mandatory policy has filed a charge with the EEOC, and indeed, none supports the lawsuit. Pursuant to 29 U.S.C. § 626, the EEOC may commence actions in district court to obtain both legal and equitable relief. Furthermore, under § 626(b), the ADEA specifically incorporates the enforcement provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* Those provisions endow the EEOC with broad enforcement powers. Section 16(c) of

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> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> . . .
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
>
> (F)(i) the individual is given a period of at least 21 days within which to consider the agreement;
>
> . . .
>
> (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

the FLSA, 29 U.S.C. § 216(c), authorizes the EEOC to bring actions on behalf of aggrieved employees and to seek relief including back wages and liquidated damages. Under section 17, 29 U.S.C. § 217, the EEOC has the separate and independent power to investigate possible violations and to institute injunctive proceedings. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1062-63 (2d Cir. 1988). Under the EEOC's own regulations, the Commission has the power to bring an action even when the aggrieved party does not wish to proceed. *See* 29 C.F.R. § 1626.13 (1995) ("Because the Commission has independent investigative authority, *see* §1626.4, it may continue any investigation and may secure relief for all affected persons notwithstanding a request by a charging party to withdraw a charge.").

Many courts have acknowledged the EEOC's independent authority to bring suit against an employer. In a case exempting the EEOC from the traditional rules of class certification, the Supreme Court noted that the EEOC has the authority to bring suit independent of any private plaintiff's rights: "[T]he EEOC is not merely a proxy for the victims of discrimination .... Although [it] can secure specific relief, such as hiring or reinstatement ..., on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity ... asserted through direct Federal enforcement.'" *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (quoting 118 Cong. Rec. 4941 (1972)). Also, in *dicta* the Court has stated that "the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA from any source, and it has independent authority to investigate age discrimination." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quotation marks omitted).

J&H does not dispute the EEOC's broad power to *investigate* discrimination in the absence of an official charge or its authority to proceed with its suit in the public interest after the employee who originally filed the charge has settled. However, it seeks to distinguish those circumstances from the

instant case—in which J&H claims there is no aggrieved party at all. This argument has some appeal, inasmuch as it appears anomalous that the EEOC should be authorized to bring suit on behalf of individuals who do not believe themselves to be victims of discrimination and who seem to have no interest in pursuing a suit against their employer. Even if J&H's current and former directors are pleased with the policy now in force, and may indeed benefit from a generous retirement package, that does not mean that the policy has not caused or will not in the future cause some tangible injury. Significantly, the retirement policy prevents any employee over the age of 62 from ever being considered for a directorship and requires prospective directors to choose between early retirement or forfeiting a directorship.

We do not find it significant that no J&H employee has filed a charge with the EEOC. Other courts have found that the EEOC may file suit where a charge was not filed by the affected employee. In *EEOC v. American & Efird Mills, Inc.*, 964 F.2d 300, 304 (4th Cir. 1992), the Fourth Circuit stated that "[u]nlike the limited authority given the EEOC under Title VII ... the ADEA gives the EEOC authority to investigate *and enforce* independent of individual employee charges." (Emphasis added.) Similarly, in *EEOC v. Air Line Pilots Ass'n,* 885 F. Supp. 289, 292-93 (D.D.C. 1995), a district court held that the EEOC had independent authority to file a civil suit in its own name when it learned of an additional instance of discrimination through its investigation of a separate charge filed with the agency. *See also EEOC v. Reichhold Chemicals, Inc.,* 700 F. Supp. 524, 527 (N.D. Fla. 1988) ("[W]here the EEOC, in the course of investigating a charge of discrimination, develops facts which lead it to believe that a separate, uncharged ... form of discrimination has occurred, it may ... file suit."). These are the precise circumstances before us. Accordingly, in light of the strong public interest in eradicating age discrimination for future J&H directors and the EEOC's broad statutory power to enforce the ADEA, we find that the EEOC has the authority to pursue the present suit against J&H despite the fact that no current or former director complains of the challenged policy.

D. *The ADEA*

1. *Directors as Employees*

The issue here does not involve any disputed facts; there are no material facts in dispute. Rather, we are called on to determine the legal significance of the terms and conditions of a director of J&H for purposes of the ADEA. Accordingly, we review de novo the district court's finding that J&H directors are employees for the purposes of the ADEA.

J&H argues that even if the EEOC acted within its authority in filing suit, the ADEA does not apply to the retirement policy because its directors are not "employees" within the meaning of the statute. J&H claims that the owner-officer-directors are *de facto* partners, and should be treated as such for purposes of the Act. We have previously held that individuals properly classified as partners are exempt from the provisions of the ADEA. *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 797 (2d Cir. 1986).

However, we also stated in *Hyland* that the partnership exemption is limited to actual *de jure* partnerships and would not be extended to closely-held corporations or other organizations whose structure resembles that of a partnership. There, we held that a plaintiff radiologist who was a corporate officer and director of a professional corporation in which there were only four stockholders, who divided profits and losses equally among themselves, was still an "employee" within the meaning of the ADEA, and we declined the defendants' invitation to disregard the chosen corporate form:

> The fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation ... is no reason for ignoring a form of business organization freely chosen and established.... Having made the election to incorporate, they should not now be heard to say that their corporation is "essentially a medical partnership among co-equal radiologists."

Id. at 798. The court continued: "[W]here the individual involved is a corporate employee ... we hold that every such employee is 'covered' for purposes of the ADEA and that any inquiry respecting [his] partnership status would be irrelevant." *Id; see also Johnson v. Cooper, Deans & Cargill, P.A.*, 884 F. Supp. 43, 45 (D.N.H. 1994) (following *Hyland* in holding that a corporate defendant is precluded from arguing that it is entitled to be treated as a *de facto* partnership for purposes of 42 U.S.C. § 2000e(b)). *But see Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991) (declining to follow *Hyland* and applying "economic realities" of management, control, and ownership to determine whether member/shareholder of professional corporation should be treated as a *de facto* partner); *EEOC v. Dowd & Dowd, LPD.*, 736 F.2d 1177, 1178 (7th Cir. 1984) (holding that economic realities should be examined to determine whether attorney-shareholders of a professional corporation are employees or partners for purposes of Title VII).

J&H argues that our opinion in *Frankel v. Bally, Inc.*, 987 F.2d 86 (2d Cir. 1993), suggests that the *Hyland* rule requiring strict adherence to the defendant's chosen form of organization has been undercut and that the court should look to common law principles and assess whether J&H's owner-director-officers should be treated as partners or employees. As the district court noted, *see Johnson & Higgins*, 887 F. Supp. at 687 n.7, this argument is without merit. The *Frankel* decision, following the Supreme Court's holding in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), decided that the question of whether an individual is an "employee" or an "independent contractor" within the meaning of the ADEA must be determined by reference to common law agency principles, and not to a more liberal construction aimed at achieving the Act's "remedial purposes." *Frankel*, 987 F.2d at 89-90. J&H correctly notes that the *Hyland* court began its analysis with a recitation of the "liberal construction" language subsequently rejected in *Darden* and *Frankel*, 794 F.2d at 796. However, *Hyland* did not turn on the court's adoption of an unduly broad definition of an "employee" or its deviation from the common law agency test for employment.

While the court did discuss the definition of an employee and the various tests used to distinguish an employee from an independent contractor, that discussion was not directly related to its simple holding that the partnership exemption from the ADEA was unavailable to a corporate enterprise. "While those who own shares in a corporation may or may not be employees, they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive." *Hyland,* 794 F.2d. at 798. Accordingly, *Hyland* remains good law, and J&H is precluded from arguing that it is exempt from the ADEA because it is a *de facto* partnership.

While *Hyland* prevents J&H from claiming that its directors are "partners," that case does not preclude the argument that J&H should be exempt from the ADEA on account of their position as *directors.* The argument goes as follows: If J&H's directors are more akin to *employers than employees,* then they should be exempt from the provisions of the ADEA as directors, regardless of the inapplicability of the partnership exception. In other words, J&H's directors do not satisfy the definition of "employees" under the ADEA.

The ADEA's statutory definition of an "employee" sheds little light on this inquiry. Under 29 U.S.C. § 630(f), an employee is defined as "an individual employed by any employer." Indeed, the definition of an employee under analogous statutes such as Title VII and the FLSA is equally circular. *See* 42 U.S.C. § 2000e(f) (defining "employee" as "an individual employed by an employer"); 29 U.S.C. § 203(e)(1) (same). Accordingly, we turn to decisional law to aid us in our inquiry into whether and under what circumstances a director may be considered an "employee" for purposes of the ADEA.

Several courts have held that, although corporate directors are traditionally viewed as employers, they may also be considered employees depending upon their position and responsibilities within the corporation. In *Chavero v. Local 241,* 787 F.2d 1154, 1157 (7th Cir. 1986), the Seventh Circuit held that "[a] director may accept duties that make him also an

employee," noting that "the primary consideration is whether an employer-employee relationship exists." *See also Zimmerman v. North American Signal Co.*, 704 F.2d 347, 352 (7th Cir. 1983) (holding that "employee" should be defined by reference to common law principles of employment and that definition should not "include persons who are no more than directors of a corporation or unpaid, inactive officers"). Similarly, the Sixth Circuit has held that officers and directors who also performed traditional employee duties, such as maintaining records, preparing financial statements, and managing the organization's daily business, should be considered employees for the purposes of the ADEA—regardless of their role as policy makers on the board of directors. *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983).

While the court in *Hyland* held that status as a corporate director/shareholder and status as a partner are "mutually exclusive" for purposes of exemption from the ADEA, it did not imply, much less hold, that all directors must be viewed as employees. Directors who do not possess the common law indicia of employment are clearly not "employees." Thus the *Hyland* court looked to the director's role in the company to determine whether there existed an employment relationship in addition to the role of director. *Hyland*, 794 F.2d at 798. The two can often exist side by side, as "[t]here is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." *Id.* at 796 (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961) (alteration in original)).

In assessing whether a director has assumed duties that make him an employee for purposes of the anti-discrimination laws, courts have molded the somewhat nebulous "common law agency" test of employment—which requires a broad examination of the totality of the circumstances—into a more manageable three-factor test: (1) whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in the hierarchy.

Lattanzio v. Security Nat'l Bank, 825 F. Supp. 86, 90 (E.D. Penn. 1993); *see also Chavero*, 787 F.2d at 1157 (finding no employee relationship where members of board of directors did not oversee daily operations and reported to no superior body or individual); *Zimmerman*, 704 F.2d at 351-52 (finding no employee relationship where directors took no active role in daily affairs of corporation and received payment only for directorial duties); *First Catholic Slovak Ladies Ass'n*, 694 F.2d at 1070 (finding employee relationship where members of board maintained records, prepared financial statements, managed the office, were responsible for the work to the governing body of organization, and drew salaries for their daily responsibilities); *EEOC v. Pettegrove Truck Serv., Inc.*, 716 F. Supp. 1430, 1433 (S.D. Fla. 1989) (finding employee relationship where director served essentially as manager of operations and worked for company as her full time occupation); *Schoenbaum v. Orange County Ctr for the Performing Arts, Inc.*, 677 F. Supp. 1036, 1038 (C.D. Cal. 1987) (finding no employee relationship where trustees were "active in other business pursuits and devoted only a relatively small portion of [their] time" to the organization).

Because all three of these prongs are satisfied in this case, we conclude that, as a matter of law, J&H's directors are also "employees" for purposes of the ADEA. First, it is clear that J&H's directors performed traditional employee duties. They are chosen from people in senior managerial positions, and while they do take on additional oversight and policy-making responsibilities by virtue of their positions as directors, they also continue their daily duties as senior officers or managers. For example, Gardner Mundy was employed as J&H's general counsel and corporate secretary both before and after his election to the J&H Board of Directors. As such, he was responsible for overseeing the firm's legal affairs, and for keeping corporate records for J&H. Second, J&H's directors all work full time for J&H. Unlike the directors in *Zimmerman*, 704 F.2d at 351, and *Schoenbaum*, 677 F. Supp. at 1038, they are not primarily engaged in other pursuits and they devote the vast majority of their working time to their positions as senior managers or officers of the organization. Third,

although the Board itself is the highest authority within J&H, the individual directors, in their capacity as officers and managers, each report to the senior members of the Board, who are responsible for their annual performance evaluations.[4] While the compensation of J&H's directors consists of a percentage of the annual profits—suggesting that they do not have a traditional employment relationship—their compensation is tied to their performance as evaluated by the senior members of the Board. This authoritative evaluation by their superiors suggests that J&H directors *are* employees under the common law test. Most telling is J&H's own admission that, upon election, a J&H director *"will continue in J&H's active service as an officer and employee of J&H or one of its subsidiaries."* (Emphasis added.)

We attach no particular significance to the fact that a director's employment by J&H is "but an aspect of the fundamentally entrepreneurial relationship that the Directors have among themselves and to the firm as a whole." This merely indicates, as the district court held, that J&H's directors have a dual status as employees and directors. *Johnson & Higgins,* 887 F. Supp. at 685, 688. In an unrelated ADEA suit by a former director against J&H, the Third Circuit similarly acknowledged that whether the ADEA would apply to J&H's directors "is a function of [the directors'] duties and not [their] title(s]." *Sempier v. Johnson & Higgins,* 45 F.3d 724, 728 n.4 (3d Cir.), *cert. denied,* 115 S. Ct. 2611 (1995).

We hold the ADEA to be applicable here insofar as the mandatory retirement policy requires J&H's directors to retire as *officers and managers employed by the firm.* An employer cannot require senior-level employees to retire merely because they have reached the age of 60 or 62. Congress has specifically stated that the minimum mandatory retirement

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[4] With the maximum number of directors set at 44, this could result in roughly 40 directors reporting to a small group of senior directors for "probing" and "meaningful" evaluations. This is not a system designed to make "directors accountable to each other," as suggested in the dissent.

age for senior-level employees is 65. *See* 29 U.S.C. § 631(c). Simply put, any policy that requires such employees to retire, solely on account of age, before they reach 65, violates the ADEA.

As the district court well noted, J&H can comply with the ADEA by severing the link between the individual's employee status and his director status. Once so severed, non-employee directors are not subject to the ADEA as employees. Additionally, J&H is free to implement a mandatory retirement policy that requires them to sell their stock and cease service on the Board at any age. *See* 29 U.S.C. §§ 623 (no provision in this section, "Prohibition of age discrimination," protecting employers from the type of discrimination at issue in this case), 630(f) (ADEA definition of employee as one "employed by any employer").

2. *Reasonable Factors other than Age*

J&H argues that even if its mandatory retirement policy must comply with the provisions of the ADEA, it does not violate that statute because it falls under the exception for employment decisions based on "reasonable factors other than age."[5]

The "reasonable factor other than age," or "RFOA," exception states that "[I]t shall not be unlawful for an employer to take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age ...." 29 U.S.C. § 623(f)(1). The relevant EEOC regulation interpreting the RFOA provision, 29 C.F.R. § 1625.7(c), states that "[w]hen an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable

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[5] J&H admits its policy is facially discriminatory on the basis of age, and thus the four part inquiry for assessing intentional discrimination first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), is inapplicable. *See Johnson v. New York*, 49 F.3d 75, 78-79 (2d Cir. 1995) ("In cases ... where there is direct evidence that the disparate treatment ... is age-dependent, the *McDonnell Douglas* search for a motive is unnecessary and therefore inapplicable.").

factor other than age is unavailable." Accordingly, the district court found that the RFOA exception was not applicable to J&H's mandatory retirement policy, which not only "uses age as a limiting criterion," but uses it as its sole criterion. *Johnson & Higgins,* 887 F. Supp. at 685-86.

J&H argues that the strict terms of the EEOC's interpretation of the RFOA exception, 29 CFR § 1625.7(c), cannot be reconciled with the broad language of the RFOA statutory exception in the ADEA itself, 29 U.S.C. § 623(f)(1). J&H suggests, in effect, that the congressionally crafted RFOA exception should not be read out of the ADEA by the EEOC's interpretation of that exception. J&H asserts that the statutory RFOA exception was intended to provide an exception for circumstances where an employer could demonstrate that a particular policy or decision, though expressed in terms of age, was actually based on "reasonable factors other than age." J&H thus claims that its mandatory retirement policy was driven by the "Directors' efforts to plan their own compensation and succession in an orderly fashion"—rather than any arbitrary judgments about the capabilities or desirability of older workers—and therefore the RFOA defense applies.

We find J&H's argument to be without merit. The plain language of § 623(f)(1) makes it clear that an employer has a defense if his policy is based on reasonable factors "other than age," *not* if the policy is reasonably based on age. By its terms, the statute supplies an exception for "age-neutral" decisions based on other factors such as health or even education that might be correlated with age, *see Iervolino v. Delta Air Lines, Inc.,* 796 F.2d 1408, 1415, 1419 (11th Cir. 1986) (describing RFOA defense as a defense that a particular practice is "age neutral"; airline's policy prohibiting flight captains of any age from transferring to flight engineering positions was found to be based on a reasonable factor *other* than age), *cert. denied,* 479 U.S. 1090 (1987)—not an exception for policies that *explicitly but reasonably* discriminate based on age. Our view has been adopted by at least two other courts of appeals. *See EEOC v. Massachusetts,* 987 F.2d 64, 72-73 (1st Cir. 1993) (holding that state could not maintain

RFOA defense where age was only consideration for policy requiring medical examination of workers, despite state's assertion that policy motivated by concerns for fitness); *EEOC v. County of Allegheny*, 705 F.2d 679, 682 (3d Cir. 1983) (holding that "the plain language of [§ 623(f)(1)] precludes ... an argument" that reliance on a state statute barring persons over 35 from taking police examination is basis for a defense on a reasonable factor other than age).

Furthermore, J&H's argument is quite similar to one rejected by the Supreme Court in the context of a Title VII suit challenging a city department's policy of requiring larger pension contributions from women because of their greater longevity. In *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), the Department of Water & Power argued that its pension policy was based on longevity, *not* sex. In rejecting this approach, the Court held:

> It is plain ... that any individual's life expectancy is based on a number of factors, of which sex is only one. The record contains no evidence that any factor other than the employee's sex was taken into account in calculating the ... differential between the respective contributions by men and women .... [O]ne cannot say that an actuarial distinction based entirely on sex is based on any other factor other than sex. Sex is exactly what it is based on.

Id. at 712-13 (quotation marks omitted).

The mandatory retirement policy at issue in the present appeal is no different. We have no reason to doubt J&H's assertion that its policy is an attempt to achieve orderly succession and turnover among directors. Nevertheless, we find the question of J&H's assertedly benign intentions—J&H's claim that it did not intend to invidiously discriminate on the basis of age—irrelevant. Age is only one factor to consider in developing such a policy—a director's length of service is equally, if not more, significant. J&H's policy differentiates based on a director's age, and J&H simply cannot assert that it

is based on any other factor. Accordingly, the RFOA defense is unavailable.

E. *Injunctive Relief*

Finally, we turn to J&H's objections to the scope and appropriateness of the injunctive relief granted. The ADEA directs courts to "grant such legal or equitable relief as may be appropriate to effectuate the purposes" of the Act. 29 U.S.C. § 626(b). Under the ADEA, courts possess "broad discretion ... in fashioning relief." *Malarkey*, 983 F.2d at 1215. A district court's award of equitable and injunctive relief is subject to reversal only for abuse of discretion or a clear error of law. *Id.* at 1214. J&H argues that the district court abused its discretion in issuing the injunction because, *inter alia*, it violated Federal Rule of Civil Procedure 65(d) by failing (1) to set forth the reasons for the injunction and (2) to describe the act or acts sought to be restrained in sufficient detail.

We are unpersuaded. First, the injunction entered fully complies with Rule 65(d) insofar as the opinion and order accompanying it set forth extensive findings of fact and conclusions of law. The court determined on the basis of an extensive record and full briefing, that J&H's policy requiring mandatory retirement for all employee-directors at age 60 or 62 violated the ADEA. No more specific reasons need be—or in this case, could be—given. *See New York State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 398 (2d Cir. 1992), *vacated on other grounds*, 113 S. Ct. 1233 (1993).

Second, the injunction is not impermissibly vague; it clearly prohibits J&H from enforcing its unlawful retirement policy against any of its present directors and from forcing its new directors to leave the company at an age that violates the ADEA. J&H was "permanently enjoined ... from retiring employee-directors ... pursuant to its ... unlawful retirement policy" and directed to "file and serve on [the EEOC] ... a modified retirement policy for its employee-directors that complies with the ... ADEA." The court proposed one possible modification of the policy that would bring the policy into conformity with the ADEA: a severance of the link between

director and employee status—that is, "allowing ... individuals to remain as employees of J&H even after losing their Directorship" at age 60 or 62. *Johnson & Higgins*, 887 F. Supp. at 688.

Inasmuch as broad injunctive relief is justified in fashioning remedies for violations of the ADEA, *Malarkey*, 983 F.2d at 1215; *see also* 11A CHARLES A. WRIGHT et al., FEDERAL PRACTICE & PROCEDURE § 2955 at 327 (1995), we find that the district court did not abuse its discretion in enjoining J&H's current policy. Because it is the policy itself that constitutes the violation—rather than its application to a particular employee—the injunction could not be more narrowly tailored than it was.

We have considered J&H's other arguments concerning the scope and appropriateness of the injunction, and we find them to be without merit.

III. CONCLUSION

To summarize:

1. We affirm the district court's determination that the EEOC satisfied its statutory duty to "conciliate" before filing a formal complaint. Where a defendant responds to an invitation to conciliate by denying the allegations, the EEOC's duty to conciliate is satisfied, and it may proceed to litigation.

2.. We affirm the district court's holding that the EEOC's broad enforcement power under the ADEA permits it to pursue litigation against policies that it believes to violate the Act, even where no aggrieved party has filed charges or supports the suit.

3. We conclude that the ADEA is applicable to J&H's mandatory retirement policy insofar as the policy requires J&H's directors to retire as employees of the firm; and we find that the policy, which requires director-employees to step down at age 60 or 62, is *not* based on reasonable factors other than age.

4. We conclude that the district court did not abuse its discretion by enjoining J&H from enforcing its discriminatory mandatory retirement policy.

Accordingly, the order of the district court granting partial summary judgment to plaintiff is affirmed, and the cause is remanded to the district court for a determination of what additional relief, if any, is appropriate.

JACOBS, *Circuit Judge*, dissenting:

I respectfully dissent.

A.

The contractual arrangement challenged here by the EEOC is one that bestows on the directors of J&H—the supposed victims of invidious discrimination—privileges and powers held by few persons in the corporate world. Specifically, they acquire a substantial ownership stake in the firm, a share in its considerable profits, a seat on the board of directors, and a long-term payout of profits enjoyed upon retirement. Integral to this arrangement, J&H's directors agree to retire at age 60 or 62, depending on their length of service. In this way, the ownership of the firm lies solely in the hands of the people who run it; succession of ownership and control is orderly and based on entrepreneurial talent; and a back-loaded post-retirement compensation scheme (the Ten-Year Contract) gives a tangible incentive for current directors to focus on long-term growth and stability rather than on quarterly or current-year profitability.

These supposed victims are the architects of this arrangement. As a class, they created it, they acceded to it when they accepted their directorships, and they hold the power to change it if they wish. They actively oppose the EEOC's initiative, and have registered their opposition by affidavits filed in the district court. In short, in this case there is no grievance, no victim, no loss and no claim. I have thought about this, and I do not know why the EEOC should wish to dismantle this wise and provident scheme of corporate governance, or what public interest is served by regulating the age of the stockholder-directors of J&H, or why the EEOC has been inspired to allocate its resources to this struggle—leaving its 100,000 case backlog to grow and age. *See* EEOC Chairman Gilbert F. Casellas, Statement Before House Committee on Appropriations, 1996 WL 5511770 (Apr. 25, 1996); *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 744 (7th Cir. 1994) (EEOC "has long complained of being understaffed and has long been criticized

for delay"). As J&H observes, this case is "a nonsensical waste of public and private resources."

Nevertheless, it seems to me that (as the majority holds) the EEOC has the power to press a claim on behalf of unwilling claimants. *See* 29 C.F.R. § 1626.13 (1996). Otherwise, an intimidated employee might derail an enforcement action that serves the interests of that employee and others who are or may become similarly situated. I therefore agree with the majority that the EEOC has the naked power to press a claim sua sponte and against the express wishes of the supposed victims. Indeed, I would concur in the result if I thought that the statute did in fact proscribe J&H's program of corporate ownership and governance.

I dissent on the ground that the directors are employ*ers*—as opposed to employ*ees*—for purposes of their contractual arrangements *inter se*, and therefore are not protected in respect of those arrangements by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (the "ADEA").[1] In ascertaining whether the J&H directors are employers or employees, the majority focuses on only three factors that are not necessarily dispositive of the issue. In my view, such a limited inquiry necessarily fails to account for the economic realities of this case. A broad examination of all the circumstances reveals, at the very least, that material issues of fact preclude entry of summary judgment against J&H.

B.

As the majority points out, the ADEA's definitions of the term "employee" and "employer" are circular. *See* 29 U.S.C. § 630(b), (f). It is nevertheless settled that the ADEA's

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[1] Necessarily, I also conclude that the injunction represents an abuse of discretion, since without a violation of the statute, there is no relief that can make sense. I think this will become even clearer as the injunction is refined, and the delicate contractual balances created by sophisticated financial professionals become distorted by windfalls, asymmetries, and unsettled expectations. Indeed, the result in this appeal does not compel the conclusion that equity justifies any ultimate relief at all.

"protection extends only to those individuals who are in a direct employment relationship with an employer, and that a claim under its provisions lies solely in favor of a person who is an employee at the time of termination." *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 796 (2d Cir. 1986). The EEOC may thus prevail on summary judgment only if there is no question that the directors, in implementing their governance and retirement scheme, acted pursuant to a "direct employment relationship with an employer." If, on the other hand, a material issue is raised as to whether the directors were functioning as employ*ers* in implementing the policy, J&H must prevail on this appeal.

The majority's inquiry on this issue is limited to the following three factors: (1) whether the directors perform duties traditionally performed by employees; (2) whether the directors were employed by separate entities; and (3) whether the directors report to others. Maj. op. at 20 (citing *Lattanzio v. Security Nat'l Bank*, 825 F. Supp. 86, 90 (E.D. Penn. 1993)). The J&H directors hold positions as senior managers in the firm, are employed by no other entity, and report to one another in the course of their duties. For these reasons, the majority holds as a matter of law that the J&H directors are employees within the meaning of the ADEA. Maj. op. at 21-22.

I agree that the above three factors may be relevant to ascertaining employment status. But they cannot be dispositive. Employment status is to be determined based on the "economic reality" of the relationship between the individual and the firm as respects the challenged practice or decision. *See Goldberg v. Whitaker House Cooperative*, 366 U.S. 28, 33 (1961). By definition, any inquiry based on economic reality cannot be limited to three yes or no questions. *Goldberg* requires us to undertake a searching inquiry into the circumstances of the case, as other circuits and the EEOC have done in ascertaining whether partners in partnerships are covered by the anti-discrimination laws. *See, e.g., Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991) (focusing on "actual role played by the claimant in the

operations of the involved entity and the extent to which the role dealt with traditional concepts of management, control, and ownership"); *Wheeler v. Hurdman*, 825 F.2d 257, 276 (10th Cir.) (examining "participation in profits and losses, exposure to liability, investment in the firm, partial ownership of the firm assets, and . . . voting rights"), *cert. denied*, 484 U.S. 986 (1987); *EEOC v. Dowd & Dowd*, 736 F.2d 1177, 1178 (7th Cir. 1984) (examining "management, control and ownership" of professional corporation to determine whether shareholders were employees); EEOC Decision No. 85-4, 1985 WL 32777 (E.E.O.C.) at *2 n.4, 27 Fair Empl. Prac. Cas. (BNA) 1885, 1886 n.4 (March 18, 1985) ("[T]he Commission will consider relevant factors including, but not limited to, the individual's ability to control and operate the business and to determine compensation and the administration of profits and losses.").

Moreover, the three factors considered by the majority are not particularly useful in ascertaining whether a director should be considered an employer or employee. The majority concedes that J&H directors "do take on additional oversight and policy-making responsibilities by virtue of their positions as directors," but concludes that they perform duties traditionally performed by employees because they "continue their daily duties as senior officers or managers."[2] Maj. op. at 21. The majority buttresses its conclusion with J&H's admission that the directors "are also full-time employees of the firm."[3]

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[2] The majority relies in part on *EEOC v. First Catholic Slovak Ladies Ass'n*, in which the Sixth Circuit held that the elected directors of a nonprofit charitable institution performed duties typical of employees, and thus were "employees" under the ADEA. 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983). But that opinion is silent as to the degree of control that the directors had over the organization, or whether the directors held an entrepreneurial stake in the enterprise.

[3] The majority makes much of J&H's admission that a J&H officer continues "in J&H's active service as an officer and employee" upon nomination to the board of directors. Maj. op. at 22. But in determining whether a director occupies the role of employee or employer, the court's inquiry "should not center on the label which the organization has chosen

(Footnote continued)

This hands-on role for all directors may be unusual in a company as large as J&H. But day-to-day work is not inconsistent with status as a director who is an employer-owner. Some directorships may be sinecures, but there are innumerable corporations in which the sole workers are the owner-directors. A J&H director does not surrender powers and duties as a director, or legal rights as a shareholder in the firm, because she runs a division or pitches a client. There is no support for the idea that persons who do the heavy lifting in a business are employees as opposed to directors and owners.[4]

The other two factors set forth in *Lattanzio* and considered by the majority also seem to be beside the point. The sole shareholder of a corporation who holds the titles of director, chairman and CEO is unlikely to be "regularly employed by a separate entity." Maj. op. at 20. But we would certainly consider her an "employer" within the meaning of the ADEA. Likewise, even the most senior directors and officers may be subject to "authoritative evaluation" of performance by their fellows. Maj. op. at 22. Such an arrangement may be indicative of a traditional employment relationship. But it may also be a convenient and effective way of ensuring that senior directors and officers remain accountable to each other for their performance. Partners, for example, often agree to evaluation by a committee of their peers. But that does not make them employees, because partners hold "unique status as *business*

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to give to the position." *First Catholic Slovak Ladies*, 694 F.2d at 1070. Because I believe that the directors function purely as employ*ers* in setting their own terms of employment—which is the particularized inquiry we are required to undertake here—I attach no significance to the label used by J&H.

[4] Ascertaining employee status by reference to the most workaday tasks that a director performs in a business muddles the analysis. As the Tenth Circuit noted (in a case involving partners), such a rule would create "[a] potentially chaotic situation . . . with partners drifting in to and out of covered 'employee' status, remaining partners all the while, with no one ever quite knowing who is an employee/partner and who is a 'pure' partner." *Wheeler v. Hurdman*, 825 F.2d 257, 274 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987).

owners and managers" that is incompatible with status as employees. *Hyland*, 704 F.2d at 797 (emphasis added). *See also Fountain*, 925 F.2d at 1400-01 (partners held not to be employees); *Burke v. Friedman*, 556 F.2d 867, 869 (7th Cir. 1977) (same); EEOC Decision No. 85-4, 1985 WL 32777 (E.E.O.C.) at *1, 37 Fair Empl. Prac. Cas. (BNA) 1885, 1886 (March 18, 1985) (same).

I would therefore go beyond the three *Lattanzio* factors in order to ascertain whether there is no material question that the J&H directors are in a direct relationship with an employer. J&H contends that its directors *as directors* share control, legal authority, voting rights and an entrepreneurial stake in J&H, and for that reason should be treated as employers when they adopt and implement policies binding only among themselves. The majority opinion, however, gives no weight to J&H's argument:

> We attach no particular significance to the fact that a director's employment by J&H is "but an aspect of the fundamentally entrepreneurial relationship that the Directors have among themselves and to the firm as a whole."

Maj. op. at 22.

In my view, the failure to attach outcome-determinative significance to that fact is the main analytical error in the majority opinion. Where directors own and control the firm, and where the board of directors "reports to no one other than itself[,] . . . . the individual board members are not employees" for purposes of the anti-discrimination laws. *Chavero v. Local 241*, 787 F.2d 1154, 1157 (7th Cir. 1986) (per curiam). *See also Zimmerman v. North American Signal Co.*, 704 F.2d 347, 351-52 (7th Cir. 1983) (directors and unpaid, inactive officers were not employees); EEOC Decision No. 80-23, 1980 WL 8891 (E.E.O.C.) at *1-*2, 26 Fair Empl. Prac. Cas. (BNA) 1807, 1808 (Aug. 27, 1980) (trustees who held exclusive authority to control and manage a trust and its assets were employers, not employees of trust).

The J&H directors hold nearly all of the firm's equity. All directors forgo regular salary, and instead are compensated solely on basis of the firm's performance.[5] Board members have final authority over specific areas of business, and often manage regional offices or entire lines of business. Each director is statutorily entitled by New Jersey law to one vote at meetings of the board. N.J. Stat. Ann. § 14A:6-7.1(1) & (4) (West 1969 & Supp. 1996). The board has the power to dissolve the corporation, *id.* §§ 14A:12-1(1)(b), :12-4 & :12-2, amend the bylaws, *id.* § 14A:2-9, amend the certificate of incorporation, id. § 14A:9-2, approve mergers or consolidations, *id.* § 14A:10-3, remove and appoint officers, *id.* § 14A:6-16, and determine the duties that officers shall perform, *id.* § 14A:6-15. Because they own and control the company, J&H's directors should be considered employ*ers*—not employ*ees*—for the same reasons that a general partner is considered a "business owner[] and manager[]," not an employee.[6] *Hyland*, 794 F.2d at 797. *See also Fountain*, 925 F.2d at 1400.

Furthermore, the status of J&H's directors should be ascertained in relation to the challenged employment practice. That is because an individual may be both an employer and employee for purposes of the anti-discrimination laws. For example, a manager may be considered an "employer" in hiring or firing of subordinates, yet qualify as an "employee" if he

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[5] Directors receive (i) draws from the directors' salary pool, which depends on the performance of the firm, and (ii) dividends on any dividend-paying stock they hold, the amount of which, again, depends entirely on the performance of the firm. From time to time, directors may be awarded by their fellow directors with additional shares for outstanding contributions to the enterprise.

[6] As the majority notes, J&H is precluded by *Hyland* from arguing that its corporate directors are de *facto* partners in a general partnership as a defense to liability under the ADEA. *Hyland*, 794 F.2d at 797-98. But J&H is not making that argument. Instead, J&H argues that the directors hold ownership interests, legal authority and decision-making power commensurate with traditional employers, and for that reason cannot be considered employers in electing to bind themselves to J&H's retirement policy.

were terminated for an impermissible reason. In my view, the J&H directors are acting as "employers" when they decide among themselves the issues of tenure and retirement that bind them all. At the very least, a material issue remains as to whether the J&H directors are employees or employers under the ADEA. *See Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 n.4. (3d Cir.) ("To the extent that [the plaintiff-director] on remand pursues relief (under the ADEA) related to his status as a director, this issue should be *resolved by trial* on the basis of the parties' proof of his functions at J&H in that capacity." (emphasis added)), *cert. denied*, 115 S. Ct. 2611 (1995); *see also Caruso v. Peat, Marwick, Mitchell* & Co., 717 F. Supp. 218, 222-223 (S.D.N.Y. 1989) (denying defendant's motion for summary judgment because material issues remained as to whether plaintiff-partner was an "employee") (Walker, *J.*); *Caruso v. Peat, Marwick, Mitchell* & Co., 779 F. Supp. 332, 333 & 334 n.2 (S.D.N.Y. 1991) (question of plaintiff's employee status was decided by jury).

In sum, it is true that J&H's directors do some things that employees do. But what is relevant here is that they alone hold all the legal and financial power to direct the corporation's acts. The challenged retirement policy is one that only the directors have the power to adopt. It affects only themselves; it impacts equally and without discrimination on each; and it is part of a comprehensive contractual arrangement governing the stock ownership, management succession, and economic destiny of J&H. J&H has established a material question of fact as to whether this policy impacts the directors as employees or as employers. But I think the issue is so clear on this record that I would reverse.

B. Order of the Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the thirty-first day of January one thousand nine hundred and ninety-seven.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v Dkt No: 95-6216

JOHNSON & HIGGINS, INC.,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Johnson & Higgins,

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By: /s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

C. Opinion of the United States District Court for the Southern District of New York Granting Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

– against –

JOHNSON & HIGGINS, INC.,

Defendant.

93 Civ. 5481 (LBS)

OPINION

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APPEARANCES:

June 12, 1995

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HONORABLE LEONARD B. SAND, U.S.D.J.

SAND, J.

Plaintiff Equal Employment Opportunity Commission ("EEOC") brings this action against defendant Johnson and Higgins ("J&H") pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. Agreeing with plaintiff's contention that J&H's mandatory retirement policy, which requires those of its employees sitting on the Board of Directors to retire at the earlier of age 62, or age 60 with 15 years of service, violates the ADEA, we grant plaintiff's motion for summary judgment.

BACKGROUND

Defendant J&H is a global insurance brokerage and employee benefits consulting firm. A privately owned corporation, J&H is organized and existing under the laws of the State of New Jersey with its principal place of business in New York City.

J&H's Charter and By-laws provide that the business and affairs of J&H shall be managed by its Board of Directors, which consists of between 20 and 44 members. Affidavit of Gardner M. Mundy Dated Feb. 1, 1995 ("Mundy Aff.") at ¶ 6. Each Director of J&H must own at least 500 shares of its capital stock, and a Director who ceases to own that number of shares automatically ceases to be a Director. Moreover, when a Director leaves the Board for any reason, he is required to surrender his stock, which is allocated to other Directors. The stock is surrendered pursuant to contracts in which (i) J&H promises to pay during the next ten years the dividends that would have been payable if the Director still held the stock (meaning that the Directors to whom stock is reallocated receive no dividends on it during this ten-year period) and (ii) the outgoing Director promises not to compete with J&H and to be available as a consultant. Mundy Aff. ¶¶ 15-17.

At all relevant times, no individual has been elected a Director of J&H who was not an officer of J&H, or of one or more of its subsidiaries, and actively engaged in its service at

the time of his or her election. *Id.* ¶¶ 9, 12. Candidates for election are nominated by the Chairman of the Board after consultation with the other Directors. According to defendant, qualifications for becoming a Director include "outstanding performance" of one's senior-level duties, as well as an "effectiveness and contribution to the firm in his or her current and possible future roles [that] would be significantly enhanced by the added authority and status that a Directorship at J&H entails." *Id.* ¶ 9. When an individual is elected a Director of J&H, the requisite 500 shares of common stock are allocated for purchase by that individual at a relatively nominal cost. *Id.* ¶ 14.

Importantly, directors of J&H retain their prior duties upon becoming Director and remain "employees" of the corporation. *See* Ex. 13 to Affidavit of Sonya LeCount Dated Dec. 23, 1994 ("LeCount Aff.") at 11; *see also* Ex. 2 to LeCount Aff. at 5. However, Directors obtain additional duties in conjunction with their appointment, including possible service upon various committees and attendance at Board meetings. Ex. 13 to LeCount Aff. at 16, 43-44. In addition, their prestige and "personal stature and credibility" within the organization, as well as their "ability to get things done within and without one's particular area of responsibility," are "enormously enhanced." Mundy Aff. ¶ 11. Defendant contends that "[i]f status as a Director is accepted, 'employment' continues, but it becomes but an aspect of the fundamentally entrepreneurial relationship that the Directors have among themselves and to the firm as a whole." *Id.*

At issue in this case is J&H's mandatory retirement policy pertaining to its Directors. Adopted unanimously by the Board of Directors by resolution to the by-laws, this policy states:

> RESOLVED, that the normal retirement date for Directors be the earlier of (a) the year in which the age 62 is attained or (b) the end of the year in which age 60 is obtained and 15 years of service on the board is completed. With respect to (b), in cases of

> corporate need determined by the Chairman and approved by the Executive Committee, a Director may continue on a year-to-year basis up to but not beyond the end of the year in which age 62 is attained.

Ex. B to Mundy Aff. Twenty-two Directors have retired since the adoption of this policy on November 16, 1983.[1] Mundy Aff. ¶ 3.

Although J&H's Mandatory retirement policy applies only to Directors, it also affects their status as employees and officers of the Corporation. When a Director retires pursuant to this policy, he not only ceases to be a Director, but also loses his position as a stockholder, officer, and employee of the company. *See* Ex. 13 to LeCount Aff. at 75-76. Indeed, Directors joining the Board are asked to submit a letter of resignation "as a Director, officer and employee," which becomes effective "at the pleasure" of two-thirds of the Board. Mundy Aff. ¶ 11. In short, a new Director continues in J&H's active service as an officer and employee of the corporation or one of its subsidiaries, "but if status as a Director is accepted, the individual's role as an officer or employee becomes appurtenant to his Directorship and if the one status terminates, so does the other." *See* Ex. 2 to LeCount Aff. at 5 (letter from defendant's counsel to EEOC).

DISCUSSION

A. *Summary Judgment*

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See, e.g., Celotex Corp. v. Catrett*, 477 U.S.

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[1] Prior to adoption of this policy, the informal "understanding" among the Directors had been that they would retire at age 62, with provision for extension in certain circumstances to age 65. Mundy Aff. ¶ 20.

317, 322 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists. *See Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975) . All ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. *See Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987).

As discussed below, we find that there are no material facts in dispute in this case and that plaintiff is entitled to judgment as a matter of law.

B. *The ADEA*

The Age Discrimination in Employment Act ("ADEA" or "the Act") provides that it is "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623 (a) (1). In order to bring an action under the ADEA, a plaintiff must be an employee suing a former or current employer. *See Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 796 (2d Cir. 1986); *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F.Supp. 144, 146 (S.D.N.Y. 1987). The Act defines "employer" in general terms as "a person engaged in an industry affecting commerce who has twenty or more employees . . . ." 29 U.S.C. § 630(b). An "employee" is defined in the Act simply as "[a]n individual employed by an employer." 29 U.S.C. § 630(f).

We find that J&H's retirement policy, which requires those of its employees sitting on J&H's Board of Directors to retire when they reach the age of 60 or 62, violates the clear language of the ADEA. We might conclude differently if J&H's employee-Directors were merely forced under the policy to sell their stock and to resign from their position as Director. *See Equal Employment Opportunity Comm'n v. First Catholic Slovak Ladies Assoc.*, 694 F.2d 1068, 1069 (6th Cir. 1982) (noting that "directorships have traditionally been viewed as

employer rather than employee positions") , *cert. denied*, 464 U.S. 819 (1983) ; *see also Zimmerman v. North American Signal Co.*, 704 F.2d 347, 352 (7th Cir. 1983) ("We do not believe Congress intended the term 'employee' [under the ADEA] to include persons who are no more than directors of a corporation or unpaid, inactive officers."). *But see Sempier* v. *Johnson & Higgins*, 45 F.3d 724, 728 n.4 (3d Cir. 1995) (suggesting that J&H's mandatory retirement policy, even with respect to Director status alone, might violate the ADEA) . However, J&H's policy not only forces a Director to give up a directorship at age 60 or 62, but it also terminates one's status as officer and employee of the corporation. Because J&H's policy therefore discriminates by age against J&H's employee-Directors in their role as employees, we find that this policy is prohibited by the ADEA. *Cf. First Catholic*, 694 F.2d at 1069 (mandatory retirement plan violated ADEA not because it forced directors to retire, but because certain employees were required to be members of the Board of Directors; retirement plan thus indirectly placed age limitation on these employees).

J&H contends that its retirement policy is based upon "reasonable factors other than age" ("RFOA") and is therefore permissible under the ADEA. 29 U.S.C. § 623(f)(1). We disagree. In order to qualify for the RFOA defense under the Act, an employment practice or policy must be "age neutral." *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1415 (11th Cir. 1986), *cert. denied*, 479 U.S. 1090 (1987). As the EEOC's regulations state, "[w]hen an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable." 29 C.F.R. § 1625.7(c) . J&H's retirement policy expressly utilizes age as its sole limiting criterion: but for reaching age 60 or 62, an employee-Director could remain an employee of J&H.[2]

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[2] Indeed, J&H's General Counsel has admitted that J&H deliberately chose not to place a time limit, as opposed to an age limit, on the term of office of Director because:

(Footnote continued)

Therefore, the defense that J&H's policy is based upon reasonable factors other than age is not available.

J&H notes that its non-Director employees are not forced to give up their employee status at age 60 or 62 and argues that its employee-Directors are only required to do so because once they have resigned their Directorships it would be awkward and unrealistic for them to move from their position of power and prestige back to their former status as mere employees.[3] Transcript of Oral Proceedings Dated March 23, 1995 ("Tr.") at 18-19, 23-24. Therefore, urges J&H, we should view the termination of employee status under the retirement policy as due not to age but rather to the peculiar "dual status" of J&H's employee-Directors.

We reject this "dual status" argument in light of the recent decision of the Second Circuit Court of Appeals in *Johnson v. New York*. In that case, a civilian air base security guard for

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> the feeling was if you put an arbitrary limit on the term of office of the director, that could require the departure of someone who was still making major contributions to the company. It wouldn't make any sense for someone who became a director at age 40 to be told he or she would have to go to age 55 if he or she is productive and energetic and creative and all of the other things that are important to the well-being of the enterprise.

Ex. 13 (Examination Before Trial of Gardner M. Mundy) to LeCount Aff. at 80.

[3] At oral argument, J&H's counsel described his client's concerns as follows:

> These people as employees, as directors, they have a tremendous amount of power, authority, et cetera. To make them just employees and no longer directors and stockholders and expect them to do anything like what they are doing before, is unrealistic. To the degree that they are replaced on the Board and as stockholders by others, their presence as former directors in the employment ranks would be just too difficult to manage.

Tr. at 23-24 (statement of John F. Cannon).

the New York State Division of Military and Naval Affairs was terminated when he retired from the New York Air National Guard ("ANG") at age 60 as required by federal military regulations. *See Johnson v. New York*, 49 F.3d 75, 76 (2d Cir. 1995). New York State required its civilian security guards to be members of the National Guard and offered several seemingly age-neutral justifications for this "dual status" requirement.[4] *Id.* at 76, 77. Nevertheless, the Court found that New York's decision to require dual status was "age based" and consequently unlawful under the ADEA.[5] *Id.* at 80. Although the ANG was not within the reach of the ADEA and thus did not violate the law by forcing plaintiff to retire at age 60, the State could not adopt the ANG's facially discriminatory policy. *Id.* at 79. *See also Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1074 (1983) (employee retirement plan discriminated on the basis of sex in violation of Title VII where employees had the option of receiving benefits from one of several companies selected by the employer, all of which paid lower monthly benefits to women).

In our view, the *Johnson* court's holding precludes any argument that J&H's employee-Directors are forced to give up their employee status because of factors other than age. Moreover, J&H's mandatory retirement policy is arguably less defensible than that in *Johnson* in that it is not a third party's facially discriminatory policy that negatively impacts

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[4] New York justified its dual status requirement for the following reasons:

> 1) the policy assures that security guards are fully trained in accordance with current standards of federal military practice; 2) it assures that guards are familiar with military protocol and the equipment they are assigned to protect; and 3) it assures that guards are available to accompany their unit in the event the unit is activated.

Johnson, 49 F.3d at 77.

[5] Defendants in *Johnson* "explicitly disavowed" reliance on any possible bona fide occupational qualification ("BFOQ") defense. *See* 49 F.3d at 80. J&H asserts no such defense in this case. *See* Tr. at 21-22.

on J&H's employees, but a policy implemented and imposed by J&H itself. In addition, we find defendant's justification for its "dual status" requirement to be considerably less persuasive than those offered by the defendant in *Johnson*. While J&H may be correct that it would be uncomfortable and perhaps illogical for employee-Directors to become mere employees upon retiring from the Board, we note that J&H could easily solve this problem without violating the ADEA by structuring its retirement plan for Directors so that it took effect at age 65 rather than age 60 or 62. Under the Act, as J&H is well aware, high-level employees can be forced to retire at age 65.[6] 29 U.S.C. § 631(c).

Defendant argues alternatively that its retirement plan is not unlawful under the ADEA because J&H's Directors are not really "employees" within the meaning of the Act. These Directors not only control and manage the business, but they also are "co-owners" of the corporation, jointly holding all but a tiny fraction of its stock. As such, urges defendant, J&H should be viewed by the Court as the equivalent of a limited-liability partnership, and its owner-officer-Directors should be viewed not as its employees, but rather as its partners. The protections of the ADEA generally do not apply to those classified as partners. *See Hyland v. New Haven Radiology Assocs.*, 794 F. 2d 793, 797 (2d Cir. 1986) . *But see Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F.Supp. 144, 148-50 (S.D.N.Y. 1987) (rejecting a per se rule that partners are not employees and instead setting forth a multi-factor test).

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[6] J&H asserts that if "Directors were not required to resign until age 65, that would tie up Board seats for an average of 20 years," which is "too long a time" as far as J&H's compensation scheme and J&H's ability to attract the best Directors is concerned. In light of the fact that Congress has mandated age 65 and not age 60 or 62 as the minimum mandatory retirement age for high-level employees, we reject J&H's argument that such considerations relating to compensation should be left to J&H's own "good-faith business judgment." Ex. 24 to LeCount Aff. (letter from J&H's counsel to EEOC).

We believe that this argument by defendant has some merit. Employees who are also co-owners and directors of their corporation arguably are in a better position to take care of themselves than the average employee and consequently may not require the protections of the ADEA. Nevertheless, J&H's argument that its employee-Directors should be treated like partners rather than corporate employees for purposes of the Act is barred by the Second Circuit's opinion in *Hyland v. New Haven Radiology Associates*.[7] In *Hyland*, plaintiff was forced to resign from a professional corporation in which he and four other radiologists served as corporate officers and directors, were the only stockholders, and divided profits and losses evenly among themselves. *Hyland*, 794 F.2d at 794. The district court dismissed plaintiff's ADEA suit after applying an "economic realities" test and concluding that the defendant corporation amounted "to a partnership in all but name." *Id.* at 794. The Second Circuit reversed, holding that defendant's action was subject to the ADEA:

> The fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation . . . is no reason for ignoring a form of business organization freely chosen and established. Concededly, the physician members of [the defendant corporation] found that incorporation provided them with important tax advantages and employee benefits not available in any other type of business organization. Having made the election to incorporate, they should not now be heard to say that their corporation is 'essentially a medical partnership among co-equal radiologists.'

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[7] We reject defendant's contention that we are no longer bound by *Hyland* in light of *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) and *Frankel v. Bally, Inc.*, 987 F.2d 86 (2d Cir. 1993), both of which looked to common-law agency principles in determining whether an individual was an employee. We agree with plaintiff that these opinions must be viewed in their context, which involved the difference between an "employee" and an "independent contractor" for purposes of the federal employment laws.

Id. at 798.

In reaching its decision, the *Hyland* court stated that the adoption of the corporate form, despite the defendant organization's similarities to a partnership, ended the inquiry as to its liability under the ADEA: "[W]here the individual involved is a corporate employee . . . we hold that every such employee is 'covered' for purposes of the ADEA and that any inquiry respecting [his] partnership status would be irrelevant." *Id.* at 798. *Hyland* thus set forth an absolute rule that, in our view, prevents us from ignoring J&H's freely-chosen status and treating J&H for purposes of this action as a partnership rather than a corporation.

In short, J&H essentially requests that this Court create an exception to the ADEA for corporate employees who are also Directors and share-holders of their corporation. While we agree, as stated above, that such employees are arguably better able to protect themselves vis-a-vis their firm than the typical employee, we do not believe that it is our role to devise such an exception where Congress has declined to do so, especially in light of the *Hyland* decision. Congress has seen fit to make age 65 the minimum retirement age for high-level employees such as those here. *See* 29 U.S.C. § 631(c). J&H is therefore free to restructure its retirement policy so that it kicks in at age 65. Alternatively, J&H can sever the link between the employee-status and Director-status of its employee-Directors, allowing these individuals to remain as employees of J&H even after losing their Directorship. Either way, we are unconvinced that compliance with the law will be as burdensome for J&H as it contends.

C. *The EEOC's Enforcement Power*

Defendant urges that the EEOC has no power to bring this action because "no one has been aggrieved" by J&H's mandatory retirement policy. Because all of J&H's present and retired Directors are apparently satisfied with its retirement policy, J&H contends, this case should be dismissed due to the "absence of any injured party." We reject this line of argument.

Pursuant to 29 U.S.C. § 626(b), the ADEA incorporates by reference the enforcement provisions of the Fair Labor Standards Act ("FLSA") , 29 U.S.C. §§ 216, 217. Section 216(c) authorizes the EEOC to bring an action to eradicate discrimination on behalf of aggrieved employees and to seek relief including backwages and liquidated damages. Additionally, under Section 217, the EEOC has the separate and independent power to investigate possible violations of the ADEA and institute injunctive proceedings. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1062 (2d Cir. 1988). Where there is a violation of the ADEA, the EEOC may proceed under these provisions without the consent of, and indeed even against the wishes of, those individuals aggrieved. *See Equal Employment Opportunity Comm'n v. Chrysler Corp.*, 546 F.Supp. 54, 73-75 (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1987) ; *Equal Employment Opportunity Comm'n v. Blue Star Foods, Inc.*, Civil Action No. 78-5-W, 1980 WL 118, at *4 (S.D. Iowa Mar. 7, 1980).

The EEOC brings this action in response to a mandatory retirement policy that violates the clear language of the ADEA. Even if defendants are correct that "no one who is in a position to be affected wants the EEOC or this Court to do anything [that would alter the policy]," Defendant's Memorandum in Opposition at 13, that is no obstacle to the EEOC's action. The duty of employers under 29 U.S.C. §§ 623(a) and 631(c) not to terminate high-level employees before the age of 65 is not one that can be bargained away or waived. *Cf. Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 513 (9th Cir. 1978) (obligation to pay overtime wages for work in excess of forty hours a week was a "statutory duty" that "could not be modified or waived").

What J&H really seems to be arguing when it asserts that there are no "injured parties" in this action is that J&H's employee-Directors are more like co-owners or partners than employees and do not require the protections of the ADEA. However, this Court has already resolved that issue to the contrary. *See supra* pp. 10-13. We therefore reject J&H's

argument that the EEOC lacks the statutory authority to bring this suit.[8]

D. *Conciliation*

J&H argues finally that we should deny the EEOC's motion for summary judgment because the EEOC failed to attempt conciliation of this matter before bringing its suit in federal court. We disagree.

Section 7 (b) of the ADEA states that "[b]efore instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626 (b). By enacting this section, Congress expressed its preference that the EEOC undertake "strong, affirmative attempts . . . to effect compliance before resorting to legal action." *Equal Employment Opportunity Comm'n v. American Express Publishing Corp.*, 681 F.Supp. 216, 221 (S.D.N.Y. 1988) (quoting *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974)). The EEOC complies with this requirement if it "inform[s] the defendant of the nature and extent of the violations, explain[s] the relief sought, and [gives] the defendant an opportunity to respond." *Eaual Employment Opportunity Comm'n v. New Cherokee Corp.*, 829 F.Supp. 73, 81 (S.D.N.Y. 1993) (quoting *Marshall v. American Motors Corp.*, 475 F.Supp. 875, 878 (E.D. Mich. 1979));

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[8] J&H additionally contends both that this action does not present a justiciable case or controversy and that the matter presented here is not ripe for adjudication. Each of these contentions, we believe, is essentially a reformulation of J&H's argument that no "injury" exists in this action because the only individuals affected by J&H's retirement policy are Director-shareholders who are content with the status quo. As we have found that there was a violation of the ADEA here and have for that reason rejected J&H's argument that the EEOC lacks the authority to bring this action, we reject each of these related contentions as well.

see also Equal Employment Opportunity Comm'n v. KDM School Bus Co., 612 F.Supp. 369, 374 n.17 (S.D.N.Y. 1985).

Considering all of the evidence, we find that the EEOC adequately satisfied its duty to attempt conciliation before filing this action. On May 21, 1992, the EEOC began its investigation of J&H's mandatory retirement policy. Affidavit of Harold Wilkes Dated Mar. 10, 1995 ("Wilkes Aff.") at ¶ 4. On June 19, 1992, investigator Yvonne McCord held a predetermination conference via telephone with J&H's defense counsel and informed him that the EEOC had determined that J&H's policy violated the law. Affidavit of Yvonne McCord Dated Mar. 10, 1995 ("McCord Aff.") at ¶ 4. This telephone call was followed by a meeting on July 2, 1992 at which J&H's representatives informed the EEOC's representatives that they did not believe J&H's policy was unlawful. Wilkes Aff. ¶ 6; Affidavit of John F. Cannon Dated Feb. 3, 1995 ("Cannon Aff.") ¶ 6. On July 8, 1992 the EEOC issued its reasonable-cause determination and formally invited the defendant to conciliate. Ex. 6 to LeCount Aff. In a letter dated July 23, 1992, defendant once again reiterated its position that its policy did not violate the law and was based on reasonable factors other than age. Ex. 24 to LeCount Aff. By telephone on September 9 and by letters dated September 15 and December 8, 1992, the EEOC made several more unsuccessful attempts at conciliation. McCord Aff. ¶¶ 5-8; Ex. 7 to LeCount Aff; Ex. G to Cannon Aff. Finally, on August 5, 1993, the EEOC commenced this action in federal court. These actions by the EEOC, we believe, were more than sufficient to "inform[ ] the defendant of the nature and extent of the violations, explain[ ] the relief sought, and g[i]ve the defendant an opportunity to respond." *American Motors Corp.*, 475 F.Supp. at 878.

In determining that the EEOC has complied with its statutory duty to conciliate, we also find it important that J&H has maintained at all times an intransigent position regarding its mandatory retirement policy. J&H has insisted even up to and beyond the date of oral argument of this motion that any consensual resolution between it and the EEOC allow J&H to

continue to require its employee-Directors to retire before age 65. *See* Tr. at 35; Letter to Court from John F. Cannon Dated Mar. 31, 1995. The courts have held that "the Secretary is not required to continue [conciliation] efforts after the defendant has stated that it believes it has not been guilty of wrongdoing but may proceed to litigation to determine that issue." *American Motors Corp.*, 475 F.Supp. at 879. *See New Cherokee*, 829 F.Supp. at 81; *American Express Publishing*, 681 F.Supp. at 221 n.11. J&H has suggested that the EEOC has not been sensitive enough to J&H's desire "to run its affairs in accordance with the business and financial imperatives that have shaped it the way it was for 100 years." Tr. at 35. *See also* Ex. F to Cannon Aff. (letter from defense counsel to EEOC). In our view, it is J&H that has not been sensitive enough to the legitimate concerns of the EEOC that its statutory mandate be carried out.

CONCLUSION

For the reasons set forth above, plaintiff EEOC's motion for summary judgment is granted.

SUBMIT ORDER.

Dated: June 12, 1995
New York, New York

/s/ Leonard B. Sand
U.S.D.J.

D. Order of the District Court Enjoining Continued Operation of the Directors' Retirement Policy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

– against –

JOHNSON & HIGGINS, INC.,

Defendant.

93 Civ. 5481 (LBS)

ORDER

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SAND, J.

This cause came to be heard pursuant to plaintiff's motion for summary judgment as to defendant's liability under Rule 56, F.R.Civ.P. The Court having considered the pleadings, the briefs, affidavits submitted by both sides, and the Court having previously made and filed its findings of fact and conclusions of law in its memorandum of decision filed on June 12, 1995, and concluded that plaintiffs are entitled to judgment as a matter of law as for the relief prayed for in the complaint, to the extent that it is hereafter granted, it is:

ORDERED, ADJUDICATED AND DECREED THAT:

1. Plaintiff's motion for summary judgment be and is hereby granted.

2. Defendant, its officers, agents, servants, employees, or any of them, and all persons acting in concert or participation with defendant, or with any of the foregoing, are permanently enjoined:

(a) from retiring employee-directors at age 60 or 62 pursuant to its present unlawful retirement policy for its employee-directors;

(b) from requiring new employee-directors to sign and enter into agreement with defendant to retire pursuant to the agreement at any age in violation of the ADEA;

(c) from retiring any employee within the protected class pursuant to that employee's age.

3. Defendant is further directed to:

(a) rescind its retirement policy for employee-directors immediately and send notification of the rescission to all present and former employee-directors who were retired pursuant to said policy since 1991;

(b) file and serve on plaintiff by a date subject to further order of this Court a modified retirement policy for its employee-directors that complies with the provisions of the ADEA and eliminates the age-based retired date for employee-directors;

(c) serve on present and former employee-directors who retired since 1991 a copy of the modified retirement policy for employee-directors;

(d) for a period of 2 years from the date of entry of this judgment and decree, provide a copy of said posting to newly elected directors;

(e) file with the Court and serve on plaintiff by a date to be set by the Court a report, in writing and under oath, setting forth in detail the manner and form in which defendant has complied with the injunctive provisions of this judgment.

4. The parties, having agreed to bifurcate this case between liability and damages, shall enter into discovery to determine money damages, the willfulness of defendant's actions, and

further feasible injunctive relief. To achieve this end, defendant is directed to provide plaintiff with:

> (a) documents which reflect the salaries from 1987 to the present of the individual employee-directors who separated from employment with defendant since 1991.

SO ORDERED.

Dated: New York, New York
July 6, 1995

/s/ Leonard B. Sand
U.S.D.J.